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IN THE

Supreme Court of the United States

OCTOBER TERM [illegible] 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEN, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENCO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVING MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

ARVAL A. MORRIS
School of Law
University of Washington
Seattle 5, Washington

KENNETH A. MACDONALD
1410 Hoge Building
Seattle 4, Washington

Attorneys for Appellants

Of Counsel:
BYRON D. CONEY

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

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School of Law
University of Washington
Seattle 5, Washington

KENNETH A. MACDONALD
1410 Hoge Building
Seattle 4, Washington

Attorneys for Appellants

Of Counsel:
BYRON D. CONEY

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

Appellants, sixty people employed at the University of Washington, and others similarly situated, directly appeal this class action from the judgment and final order dismissing appellants' complaint with prejudice, by a three-judge United States District Court, Western District of Washington, Northern Division, entered on February 25, 1963. The final order in this case adjudged that Chapter 377, Laws of Washington, 1955, and its oath, were "not unconstitutional" as construed and as sought to be applied to appellants, and to others similarly situated, and that no declaratory judgment as to the constitutionality of Chapter 103, Laws of Washington, 1931, and its oath, would be rendered. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction over this direct appeal and that this appeal presents substantial federal questions.

OPINION BELOW

The unanimous opinion of the three-judge United States District Court, rendered February 9, 1963, has been reported in 215 F. Supp. 439 (W. D. Wash. 1963). A copy of this opinion and the judgment and final order in this case are attached hereto as Appendix A.

JURISDICTION

This class action was filed on June 6, 1962, in the United States District Court, Western District of Washington, Northern Division, by sixty employees of the State of Washington employed at the University of Washington. This suit was filed pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983. *Bell v. Hood*, 327 U.S. 678. The complaint prayed that two statutes, and their required oaths, of the State of Washington, on their faces and as they have been sought to be applied to appellants, and others similarly situated, be declared and adjudged, by the District Court, to be unconstitutional, void and of no effect, and that certain named state officials, and their successors, be permanently enjoined from further enforcing, operating and executing said statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper.

Upon the filing of the complaint a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284, and on July 13, 1962, it heard arguments on appellants' motion for an interlocutory injunction and on appellees' motions to dismiss. The motions to dismiss were denied, except as to four student plaintiffs, appellants here, who were dismissed from this action by the District

Court. A temporary injunction was granted pending a full hearing on the merits. Several lengthy pre-trial hearings were held; an extensive pre-trial order was prepared containing many stipulations, including one that no oral testimony would be presented at hearing, but that, without objection, the testimony of several persons would be, and has been, set forth in the pre-trial order, and another stipulation that a number of exhibits were admitted without objection. After hearing and opinion, the District Court, on February 25, 1963, entered a final judgment and order in this case that Chapter 377, Laws of Washington, 1955, was "not unconstitutional" and that no declaratory judgment would be rendered as to the constitutionality of Chapter 103, Laws of Washington, 1931. Its final judgment ordered that the complaint of appellants be dismissed with prejudice.

On April 23, 1963, appellants filed a notice of appeal with the United States District Court, Western District of Washington, Northern Division.

The jurisdiction of the Supreme Court of the United States to review, by way of direct appeal, the decision in this case by the District Court, Western District of Washington, Northern Division, is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court directly to review the judgment and order entered in this case: *Bailey v. Patterson*, 369 U.S. 31; *Shelton v. Tucker*, 364 U.S. 479; *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, and *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295. And see *Gerende v. Bd. of Supervisors*, 341

U.S. 56; *Adler v. Bd. of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Speiser v. Randall*, 357 U.S. 513, and *Cramp v. Florida*, 368 U.S. 278.

STATUTES INVOLVED

The statutes involved are: Chapter 103, Laws of Washington, 1931, (RCW 28.70.150, RCW 28.76.230) and Chapter 377, Laws of Washington, 1955, amending the Washington Subversives Activities Act, Chapter 254, Laws of Washington, 1951, (RCW 9.81.010 et seq.). These statutes and their required oaths are printed in Appendix B to this statement.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. *Whether two enactments of the Washington Legislature, Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, on their faces and as they have been sought to be applied to appellants, and to others similarly situated, are unconstitutional in that they are repugnant to the Constitution of the United States of America in the following respects:*

1. By violating the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution, in abridging the constitutionally protected freedoms of religion, speech and conscience, association, assembly and academic freedom:

(a) By infringing upon each and every one of the con-

stitutionally protected freedoms without an evidentiary showing made anywhere in the record that the state possesses a nexus, or a subordinating regulatory interest, which is compelling, or without any showing herein of a need for the state to protect itself from a substantial danger, be that danger clear, present, or otherwise, existing by reason of the current or past employment at the University of Washington of advocates of the proscribed doctrines and associations, or by the employment of those persons who refuse or fail to promote "by precept and example" the doctrines required by the 1931 statute, or by the employment of appellants, and others similarly situated, who, for the reason of fear of possible recrimination and on the added grounds of conscience, academic freedom and constitutional liberty, refuse to sign the declarations demanded of them, that they do not so advocate or associate, or that they will so promote the state-approved doctrines;

(b) By infringing upon each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of unconstitutional conditions upon either the continued enjoyment of employment, or future employment, at the University of Washington by requiring that appellants, and others similarly situated, relinquish their constitutionally protected rights and freedoms as a condition precedent for their continued employment at the University of Washington, where, as in this case, the evidence and record are barren of any showing by the state of any danger which the state could properly abate, or which would justify the state's demand

for an invasion and consequent relinquishment of said rights, and which would justify the imposition of conditions upon employees of the University of Washington which are incompatible with the conditions necessary for an atmosphere of free inquiry and independent thought essential and necessary for realization of academic liberty at that University;

(c) By abridging each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of prior restraints upon appellants, imposed by language which is fluid, vague, shifting, speculative and uncertain, and through sanctions, including the threats of: discharge from their employment, guilt, infamy, scorn, disloyalty, findings of unfitness for employment, and prosecutions for subversion and/or perjury; thus, forcing appellants, and others similarly situated, to restrict their areas of constitutionally protected freedom; and where the herein described prior restraints are unnecessary because two available and adequate alternative procedures, having the same purposes as the oaths in issue, currently exist and are available, and are used, by the University of Washington, each such alternative is designed for a selective approach to this area rather than the blanket attack on constitutional freedoms curtailed by the oath enactments here in question;

(d) By infringing upon the constitutionally protected freedoms from the establishment of religion and/or abridging the free exercise thereof and freedom of conscience, through the necessary operation and compulsion of these enactments which function in an automatic and summary

manner without affording appellant employees any opportunity to decline participation in the state prescribed ritual and without affording a hearing at which a refusal to participate could be explained, defended, or justified;

(e) By infringing upon each and every one of the constitutionally protected freedoms, and denying due process of law, because these enactments function in an arbitrary and discriminatory manner being summary and automatic, without affording appellants their following constitutionally protected rights: (1) to a reasonable notice of charges, (2) to a hearing, (3) to an opportunity to cross-examine witnesses supporting charges against them, (4) to an opportunity to present witnesses on one's own behalf, (5) to an opportunity to be represented by counsel, (6) to the presumption of innocence, (7) to have the accusing party carry the burden of proof, and (8) to avail themselves of the protections afforded by the rules of evidence; and such denial of constitutionally protected rights is accomplished by fluid, vague and indefinite standards thereby further deterring the enjoyment of constitutionally protected freedoms;

(f) By infringing upon each and every one of the constitutionally protected freedoms and due process of law, through statutory use of indefinite and vague standards, not susceptible of objective measurement, and which are so ambiguous, fluid and shifting that necessarily men of ordinary capacities, (including appellants), at their peril, must guess as to the meanings of these standards and are forced to speculate as to the nature of penal, and other, laws that might be applied to them, thereby denying rea-

sonable advance notice of the circumscribed areas of proscribed speech and association, subverting the presumption of innocence and shifting the burden of proof.

2. By violating Article I, Section 10, Clause 1 of the Constitution of the United States, in that said enactments are Bills of Attainder, resulting in legislative infliction of pains, penalties, and punishment by conclusively presuming guilt, infamy, disloyalty and unfitness for employment at the University of Washington, said legislative infliction of punishment and pain being made against appellants, and others similarly situated, without affording them their rights to trial or hearing, right to accusation, confrontation and cross-examination, or assistance of counsel, thus necessarily subverting the presumption of innocence, shifting the burden of proof, and altering the rules of evidence.

3. By violating the exclusively vested federal power over foreign affairs and by infringing upon the supremacy clause found in Article VI of the Constitution of the United States in attempting to regulate and restrict that sedition directed against the Government of the United States, and not being strictly confined to that sedition directed against the State of Washington, thereby impinging upon a field entirely within the province of the federal government, and which the President and Congress of the United States, by their exclusive powers as vested by the Constitution and by Congressional enactments, have preempted and wholly occupied.

4. By violating the due process clause of the Fourteenth Amendment, and through it the incorporated privilege against self-incrimination found in the Fifth Amendment,

in abridging these constitutionally protected freedoms through the imposition upon appellants of a statutory requirement that appellants, and others similarly situated, as a condition of continued employment, give evidence that may incriminate them, and otherwise bear witness against themselves.

B. *Questions relating to Chapter 103, Laws of Washington, 1931.*

5. Whether the District Court, after determining that Section 4 of the 1931 Act was clear and that it unambiguously operated in a summary manner: "There can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal to sign the oath," properly refused to enter a declaratory judgment and permanent injunction as to Section 4 of the enactment, inasmuch as it infringes upon and abridges constitutionally protected freedoms;

6. Whether the District Court, after determining that one section of the 1931 Act raised substantial constitutional issues, properly refused to render a declaratory judgment upon all the provisions of the 1931 enactment, prior to its actual enforcement, solely on the ground that the record fails to show that any appellant had "suffered actual injury by reason of the application of the oath of allegiance statute" (Chapter 103, Laws of 1931).

7. Whether the legislature of the State of Washington possesses constitutional power and authority to disqualify absolutely from the profession of teaching in any school, private or public, an otherwise fully qualified citizen of

the United States of America on the sole ground that he refused, when requested, to testify that, *inter alia*, he ". . . will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

8. Whether the lower court properly held that all alien appellants, and others similarly situated, fail to present the requisite interest necessary to challenge the constitutional validity of the 1931 statute on the sole ground, contradicted by an express stipulation and exhibit in the record to the contrary, that the administering state officers intend to violate their statutorily imposed duties and to apply said statute unevenly, differentiating between aliens and citizens, by altering for aliens the prescribed statutory wording of the oath.

9. Whether the 1931 enactment is repugnant to the Constitution of the United States by violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in arbitrarily requiring that said statutorily-worded oaths be executed by the citizen faculty members of the University of Washington of whom there is less need for said oaths, if any need exists at all, and not requiring exactly the same worded oath from the alien faculty members who are similarly situated and of whom there would appear to be greater need for said oaths, if any need be existing.

C. *Question Regarding Standing of Student Appellants.*

10. An additional question is whether the lower court

properly dismissed four students of the University of Washington, non-employees, plaintiffs below, solely on the ground that they lack the requisite interest to challenge the validity of the oath-requiring statutes here in question when their challenge to said enactments is taken on the ground of their rights to academic freedom and when this action adjudicates those constitutional rights and the conditions for realizing learning freedom at the University of Washington.

STATEMENT OF THE CASE

The sole issue in this case is the constitutionality, on their faces and as sought to be applied herein, of several statutes of the State of Washington, and their required oaths, as set out above. Although the District Court declined to make any findings of fact, which had been requested by counsel, the operative facts in this case are undisputed, there being no evidence in the record to rebut them.

The 1931 Statute

In 1931, without holding any hearings on the subject and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 103, Laws of Washington, 1931, which sets forth, in statutory terms, the following oath:

> "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and

the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

This 1931 statute further provides that the taking of said oath shall be an absolute and mandatory condition precedent for each and every person applying for, or renewing, a contract to teach in the State of Washington. If this required oath is not executed annually, then, as the statute provides: "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation."

No person in the State of Washington is qualified to engage in the profession of teaching, in public or private schools, without first having obtained prior state approval. (See Chapter 97, Subchapter 4, Article VII, § 1, p. 306, Laws of Washington, 1909, and *State ex rel Shoreline School District No. 412 v. Superior Court*, 55 Wn.(2d) 177, 346 P.(2d) 999.) And, since no person in the State of Washington can legally obtain a certificate to teach or enter into a teaching contract without executing the above stated oath, it stands as a mandatory condition precedent for each person to execute prior to his entry into the teaching profession or prior to his executing a contract to teach in that state. By statute, this oath must be sworn to by every "professor, instructor or teacher employed by any state institution of higher learning . . ." (RCW 28.76.230). Any contract entered into without the prescribed oath having been subscribed to is, automatically, rendered

null and void, and any affiant who subscribes falsely to said oath, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010). The 1931 enactment, as the District Court declared, operates automatically, thereby excluding all possibilities of a hearing where a tenured or non-tenured faculty member at the University of Washington, be he alien or citizen, could explain, defend or justify his refusal to subscribe to the oath.

The 1955 Statute

Later, in 1955, and again without holding any hearings, and again without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 377, Laws of Washington, amending its 1951 Subversive Activities Act (RCW 9.81.010 et seq.). This amendment sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act: that the official heads of each state agency, thus including the Board of Regents of the University of Washington, shall require that each and every employee, or applicant for state employment, at every such agency, thereby including all members of faculty and staff of the University of Washington, shall state under oath whether or not he or she knowingly is a member of the communist party or other subversive organization, or is a subversive person as those terms have been defined by the definitional sections of the 1951 Subversive Activities Act, part of the penal code of Washington which serve also to define various crimes of subversion

denounced by the 1951 Act. Printed forms of the required oath (see Appendix B) in the following language have been distributed to employees of the University:

> "I certify that I have read the provisions of RCW 9.81.010 (2), (3) and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and
>
> "I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.
>
> "I understand that this statement and oath are made subject to the penalties of perjury."

This last quoted sentence, by express statutory enactment (RCW 9.81.110), calls into play the Washington perjury statute (RCW 9.72.010) and, in addition to loss of employment, that statute makes any knowing misstatement in the oath form subject to the penalties of perjury, carrying a term of imprisonment in the state penitentiary for not more than fifteen years.

Pursuant to Section 1 of the 1951 Subversive Activities Act (Chapter 254, Laws of Washington, 1951, RCW 9.81.010 et seq.) a subversive person is defined as:

> "*Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.*
>
> "(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form

of the government of the United States, or of the State of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (RCW 9.81.010 (5))

A subversive organization is defined as:

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence." (RCW 9.81.010 (2))

"Communist Party Declared to Be Subversive Organization.

"The communist party is a subversive organization within the purview of Chapter 9.81 and membership in the communist party is a subversive activity thereunder." (RCW 9.81.083)

A foreign subversive organization is defined as:

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, and to establish in place thereof

> any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010(3))

This last section is not qualified in any way by terms such as overthrow of government by *force, violence* or *revolution.*

Section 2 of the 1951 Subversive Activities Act, not directly in issue in this case, but relevant to it, makes certain defined "subversive activities" a felony; while Section 3 makes it a felony to remain or become a member of a subversive organization or foreign subversive organization knowing such organization to be such. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office and from voting in state elections. Section 5 provides for the dissolution of such organizations and the distribution of their property. Sections 6, 7, 8, 10 and 21 were vetoed, and Section 9 requires that the attorney general report to the governor and legislature biennially.

Section 11 absolutely disallows any "subversive person" from eligibility for all state employment and public office. Sections 12 and 13 require that each board or agency of state government institute independent procedures to determine whether any employee is a "subversive person," and Section 14 requires that every state employee, as of June 1, 1951, submit a written statement to his agency to the effect that he or she is not a "subversive person," and that if an employee fails to submit the statement or submits an admission that such employee is a "subversive

person," then he "shall immediately be discharged." Section 15 requires the discharge of any "subversive person" if reasonable grounds exist to believe that any employee is such, and Section 16 requires that all candidates for public office file an affidavit that he is not a "subversive person." Section 17 makes any misstatements by employees punishable as perjury, and Section 18 is a severability clause. Section 19 states that the Act shall not be construed so as not to authorize civilian or military censorship or as to infringe upon freedom of speech or other constitutional guarantees. Section 20 provides the short title of the Act, "The Subversive Activities Act," and Section 22, the final section, declares that the Act shall take effect immediately.

The definitional sections of the 1951 Act, set forth above, have twice been passed upon by the Washington State Supreme Court (*Nostrand v. Balmer*, 53 Wn.(2d) 460, 335 P.(2d) 10, and *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551). The Washington court has authoritatively construed the reach of the definitional sections holding, over argument to the contrary, that these sections extend to the limits of their literal breadths. These authoritative constructions were ignored by the District Court when it passed on the issues below.

In *Nostrand v. Balmer, supra*, counsel for respondent-professors argued, among other contentions, that the sweep of the definitional sections of the Act, incorporated into the oath, abridged the professors' freedom of speech and assembly as they are protected by the First and Fourteenth Amendments to the Constitution of the United

States. (Brief of Respondents, pages 43-59; *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477). Counsel for respondent-professors, citing *Sweezy v. New Hampshire*, 354 U.S. 234, urged that the Washington Supreme Court construe the Washington Subversive Activities Act in a manner similar to that employed by this court, with reference to the Smith Act, in *Dennis v U. S.*, 341 U.S. 494, and *Yates v. U. S.*, 354 U.S. 298. (Brief of Respondent, pages 39-43). However, the Washington court refused so to limit the applications of the definitional sections of the Washington Subversive Activities Act.

On remand, in *Nostrand v. Little, supra*, the breadth of the definitional sections was not in issue, this court having remanded that case solely on the question whether, before their dismissal for refusal to execute the required oaths, professors were entitled to a hearing where they might explain or justify their refusal to sign. However, the Washington State Supreme Court, *sua sponte*, discussed the breadth of the Washington statutes and compared them with the breadth of Arkansas statutes which had been found, by this court, to be unconstitutionally broad because the statutes asked of Arkansas teachers more than that necessary to effectuate the state's legitimate interests. *Shelton v. Tucker*, 364 U.S. 479. The Washington court held that "[un]like the Arkansas statute, our Act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The 1955 amendment, in issue in this case, to the 1951 Subversive Activities Act provides that "refusal to answer on any grounds shall be cause for immediate termination

of such employee's employment or for a refusal to accept his or her application for employment." This statute likewise has been authoritatively construed by the Washington State Supreme Court. (For a history of the prior litigation of this statute, see the pre-trial order, hereinafter abbreviated as P-T.O., at pages 81 to 84.) In an earlier case, the Washington Supreme Court held that neither the 1955 amendment, nor the 1951 Subversive Activities Act, affords professors a hearing where they might explain, defend or justify their refusal to take the oath. *(Nostrand v. Little,* 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) In addition, the Washington Supreme Court held, over argument to the contrary, by the attorney general, that Washington's model state administrative code (Chapter 234, Laws of Washington, 1959, RCW 34.04.010 et seq.) does not entitle professors at the University of Washington to a hearing should they refuse to execute the oath; the model administrative code of 1959 "was not intended to supersede established procedure adopted by the regents . . . there is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years." *(Nostrand v. Little,* 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) But, the Washington Supreme Court did declare that, if a professor should refuse to execute the oath, then, before dismissal, he "will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations . . ." *(Nostrand v. Little,* 58 Wn.(2d) 111, 131, 361 P.(2d) 551, 563.)

Under the provisions of Chapter 25 (Exhibit No. 3) of the administrative code governing the University of Washington at the time of the decision in *Nostrand v. Little, supra*, a full-time member of the faculty had tenure if "he is a professor or associate professor . . ." or if he has held any full time faculty rank continuously for six years, and certain other minor categories not here important. Holding of tenure means that "no faculty member having tenure as defined . . . shall be removed from his position or subjected to discriminatory reduction of salary until he has been given opportunity for a hearing . . .". (See Chapter 25 of the Administrative Code of the University of Washington found in Appendix to *Nostrand v. Little, supra.*) The tenure provisions of the administrative code of the University of Washington do not apply evenly to all academic positions below the rank of associate professor; thus, many assistant professors, most instructors, and all lecturers, pre-doctoral associates, teaching fellows, and all members of the faculty on acting or visiting or research appointments, etc. do not have tenure and are not entitled to a hearing before their discharge for failure to execute the disclaimer oath as required by the 1955 amendment to the Washington Subversive Activities Act of 1951.

Administrative Rulings with Regard to Tenure

Washington law expressly vests final control over the university in an administrative board, the University's Board of Regents, providing that (RCW 28.77.130):

> "The Board of Regents shall:
> (1) Have full control of the university . . . and

employ members of the faculty who shall hold their positions during the pleasure of the board of regents; . . ."

At its meeting on May 25, 1962, and after the decision of the Washington State Supreme Court in *Nostrand v. Little, supra*, the Board of Regents of the University of Washington, making specific reference to the 1955 amendment and to the 1951 Subversive Activities Act, changed the administrative code governing the tenured faculty members of the University of Washington. The Board ruled that a new ground for dismissal of tenured faculty members had been added to the administrative code: to wit, failure to execute the oaths here in question as required by State law. The relevant minutes of the May 25th meeting, pages 16-17, reveals that the Board of Regents ruled that:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with provisions of Washington state law which is binding upon the Board of Regents."
>
> . . .
>
> "They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.*" (emphasis in original)
>
> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the cus-

toms of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath." (The relevant portions of the Minutes of May 25, 1962, appear in Appendix C, attached hereto; also see pre-trial order pp. 85-87).

The responsibilities and obligations of the Board of Regents in relation to the disclaimer oath are imposed by the laws of the State of Washington—one of them is in question in this case—Chapter 377, Laws of Washington, 1955. This law directs that the Board of Regents "shall require of every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party, or other subversive organization and refusal to answer shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070). Another statute, found in the 1951 Subversive Activities Act, Chapter 254, Laws of Washington, 1951, Section 14, requires that employees make written statements under oath; it provides further responsibilities and obligations of the Board of Regents that "Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged."

On May 28, 1962, after the Board's change in the Administrative Code regarding tenure, and upon advice from defendant John J. O'Connell, Attorney General for the State of Washington, defendant Charles E. Odegaard,

President of the University of Washington, acting upon the direction of defendant regents, demanded that each and every employee of the University of Washington, including all members of the faculty, alien and citizen, tenured and non-tenured, execute an oath form, either form A or B, which would satisfy the requirements of the above described statutes as they may apply individually to each employee. (See Appendix B and P-T.O. 77-78, 84, 85-87, and 91). Oath forms A and B were distributed (P-T.O. 97) and demands were made upon all employees, faculty and non-faculty, to execute them; whereupon, some employees did execute said oath forms and other employees, appellants here, and others similarly situated, resisted. (Exhibits 16 and 17). Oath form A, applying to the teaching faculty, carries two oaths, and was designed to satisfy the oath requirements of both Washington statutes involved in this case. Oath form B, applying to non-faculty, non-teaching employees, carries an oath designed solely to satisfy the requirements of the 1955 statute (Appendix B).

This suit, a class action under Rule 23 (a) of the Federal Rules of Civil Procedure was instituted on June 6, 1962.

The University of Washington

The University of Washington is older than the State of Washington, and is one of two state universities. It is located primarily in Seattle, Washington. It employs many thousands of persons, and it offers academic, scientific, research and professional education in numerous fields to more than 25,000 persons annually (P-T.O. 1). The budget

of the University derives about 60% from funds appropriated by the legislature of the State of Washington with the remaining 40% coming from diverse sources, the second largest percentage, 21%, coming from the federal government and private contract research. In recent years, this second category of funds has been increasing in its percentage share of the total University budget (P-T.O. 2). That the University is one of our great institutions of higher learning and creative research in the United States is revealed by the activities it undertakes through its fifteen schools or colleges: The Graduate School; The College of Architecture and Urban Planning; The College of Arts and Sciences; The College of Business Administration; The College of Education; The College of Engineering; The College of Fisheries; The College of Forestry; The School of Nursing; The College of Pharmacy; The School of Social Work; The School of Librarianship; The School of Law; The School of Medicine; and The School of Dentistry. The anticipated future of the University is one of growth and expansion of students and faculty. It is expected that the University increasingly will become a center for graduate and advanced professional work, although retaining its commitment to a strong undergraduate program (P-T.O. 93). The educational and research activities of the University of Washington are fully described in the pre-trial order at pages 1-69.

Appellants

Appellants in this case are sixty employees of the State of Washington, employed in various capacities at the University of Washington (P-T.O. 70-74). At least eleven

of them earn a salary in excess of $10,000 annually (P-T.O. 89). Most of the appellants, including three tenured professors who are aliens, are tenured members of the faculty. Most appellants serve the University in both professorial and research capacities. Some appellants are faculty members without tenure, but some have been hired on renewable three-year contracts (exhibits 9 and 15), and the remaining appellants are non-tenured, non-teaching members of the University staff—some serving as research associates; one as a micrometeorologist; another is an assistant editor of the University of Washington Press; two are secretary-typists, and another is a detailer in the cyclotron department.

The professorial appellants have been members of the University of Washington faculty from one to thirty-three years. They serve in many different schools and departments within the University and have distinguished themselves, and the University of Washington, in many respects: e.g., Born in Europe, Professor Z. W. Birnbaum, professor of mathematics, is Director of the University's Laboratory of Statistical Research. Dr. Birnbaum has been employed by the University for 24 years and is an international scholar. His original education took place in Poland, and he later taught mathematics at the University of Lwow, Poland. (See deposition pp. 1-3, P-T.O. 132). Professor Birnbaum engaged in post-doctoral study at the University of Goettingen, Germany. In addition to having been educated in mathematics and law in Europe, he has done mathematical research in the United States, and has received various fellowships, including a Guggen-

heim grant, which enabled him to carry out further studies. (See deposition 4-5, P-T.O. 132). Dr. Birnbaum has published one book, more than forty original research articles, plus a large number of other publications, such as book reviews, critiques, etc. (deposition 5). He is a member, and attends meetings, of many organizations limited to American membership, such as the American Mathematical Society and the Mathematical Association of America (see deposition 6-7). In addition, he is a member, and attends meetings, of international organizations, such as the International Congress of Mathematicians and the Institute of Mathematical Statistics (deposition 9,13). Professor Birnbaum attends these meetings as an official delegate from the University (deposition 12). His membership in these organizations is a necessary part of his professional duties (deposition 11, 38-40), and his attendance at the International Congress of the Institute of Mathematicians is additionally sponsored by the U.S. Office of Naval Research (deposition 12). These associations and meetings bring Professor Birnbaum, and others similarly situated, together with scholars from throughout the world, including communists who come from the Soviet Union and other Iron Curtain countries such as Poland, Hungary and Czechoslovakia. The communist scholars who attend these meetings can be expected to be interested in furthering the goals of the communist regime (deposition 20-22). At these meetings, and elsewhere, Professor Birnbaum associates with some of the most outstanding Russian mathematicians (deposition 10). In addition, he is the President-Elect of one of these international organizations, the Institute of Mathe-

matical Statistics, and his work, as its officer, would require that he come into contact with, further the interests of, and aid, advise and teach, other scholars, including communist scholars from the Soviet Union, and other Iron Curtain countries, and, including further, giving aid and assistance to those communist scholars who are seeking information, and who seek to visit other countries, and who contemplate visits to the United States (deposition 10-27). It is entirely feasible that the assistance, aid, guidance and teaching, that Professor Birnbaum renders to Soviet scholars, and other communist scholars, could be used by the Soviet Union government for military purposes (deposition 19, 17), just as the United States government could, and does, use the information which it obtains from Professor Birnbaum. Professor Birnbaum cannot execute the required oaths and continue to engage lawfully in these associations and activities, particularly in those academic and professional activities necessary for the assimilation of international up-to-date research findings and of transmitting them to his colleagues and students (deposition 22, 34, 40-41, 52-53). Professor Birnbaum fears that, were he to execute the oaths, then he might be found to be engaging in "subversive activities" or to be a "subversive person" (deposition 34) and further, he fears the threat of perjury (deposition 35 and 53).

Dr. Paul Dietrichson, an associate professor, is a Norwegian citizen. His major field of study is philosophy, particularly existential philosophy and the metaphysical foundations of ethics (P.T.O. 119). Dr. Dietrichson has pub-

lished articles and reviews in American and European journals and presently is the recipient of a grant from the David Swenson-Kierkegaard Memorial Fund to write a book on Kierkegaard's philosophy. He has published one book, Introduction to Philosophy. An alien, Professor Dietrichson refuses to execute the demanded oaths (P-T.O. 119-121).

Dr. Boris A. Jacobsohn is Director of the Summer Institute for Theoretical Physics at the University of Washington and is a senior faculty member in the Physics department (P-T.O. 101). Dr. Jacobsohn is an internationally known scholar, having collaborated on fundamental matters of physical theory, in mutual teaching, aid, advice and cooperation, with Dr. R. M. Ryndin of the Joint Institute for Nuclear Research, Dubna, Soviet Union. Their collaborative articles appear in 6 Physical Review Letters, No. 1, Jan. 1, 1961, and 24 Nuclear Physics 505-509 (1961) (P-T.O. 99). Professor Jacobsohn expects to continue in these types of associations, but cannot execute the required oaths and engage in the type of activities described above. However, his continued participation in this type of activity is essential to his calling as a Professor of Theoretical Physics (P-T.O. 99-100).

Dr. Rhoads Murphey is professor of Geography and is a member of the Far Eastern and Russian Institute at the University of Washington. He has published a textbook, An Introduction to Geography (1961), and is the Editor of the Journal of Asian Studies, which is devoted to research in the humanities and social sciences concerned with Asia (P-T.O. 113). In his latter capacity, and as a

scholar in his field, Dr. Murphey is responsible for aiding, advising and teaching scholars throughout the world, including Communist academicians from the Soviet Union and Communist China. He must, and does, associate with them in foreign organizations. Dr. Murphey is a member, and attends meetings, of the International Congress of Orientalists which brings him into direct contact with international scholars, some of whom are Soviet and, more particularly, Chinese communists, and where Dr. Murphey engages in frequent meetings and discussions with them (P-T.O. 112). Were Professor Murphey to sign the oath, he could no longer participate in these necessary associations, nor could he "discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses" in which he teaches and of the fields of academic exploration in which he works (P-T.O. 112).

Dr. W. Stull Holt is a professor of American History, and American Foreign Policy, having served the University of Washington since 1940, and having been chairman of that department for fifteen years (P-T.O. 105). Dr. Holt is the author of eight books and many articles. He has distinguished himself, and the University of Washington, in many additional ways, holding such titles as Advisor to the Officer of the Chief of Military History; Councilman of the American Historical Society; President of the Pacific Coast Branch of the American Historical Society, etc. Dr. Holt has served the United States in two World Wars, being decorated in World War I with

the American Silver Star and the French Croix de Guerre, and in World War II with the American Bronze Star and the British O. B. E. (Officer of the Order of the British Empire) (P-T.O. 105). Professor Holt refuses to sign oath Form A because were he to sign, then he would either have to violate his oath, thus risking the penalties of loss of employment, perjury, and abridging his conscience, or he would have to abide by his oath and inject the required, but historically incorrect, doctrines into his teaching, and make numerous changes in both his scholarship and attitudes, and in his public and private expression of his political and related views (P-T.O. 108).

Dr. Melvin Rader is a professor of social and moral philosophy and aesthetics, and has, with distinction, served the University of Washington and the academic community for thirty-three years. Dr. Rader is an internationally known scholar and author, being highly respected for such books as: A Modern Book of Esthetics (3rd ed. 1960); No Compromise (1939); Ethics and Society (1950), and The Enduring Questions (1956). He will publish another book, Ethics and the Human Community in 1963 (P-T.O. 115-116). Additionally, Professor Rader has authored articles, or parts of books, such as "Soviet Communism" found in Twentieth Century Political Thought (1946); "The Moral Basis of Peace" and "International Protection of Individual Freedom Within the State" in If Men Want Peace (1946); "Soviet Ideals and Postwar Cooperation" in Mosse, Soviet Far East and Pacific Northwest (1944), and "On Teaching Communism in the Public Schools," U. of W. College of Education

Record, May 1962 (P-T.O. 115). Since Dr. Rader is professor of social and moral philosophy he open-mindedly must deal directly with the original source materials of Communist thought and ideology. He frequently studies, and he requires that his students read, and master, such items as Marx's, The Communist Manifesto, and The German Ideology, and Lenin's, The State and Revolution.

In addition, Professor Rader has been a member of several organizations which seemed to have justified, in the minds of some, an investigation, in 1948, of Professor Rader by the Washington Committee on Un-American Activities. After its investigations, the Committee charged him, in a unanimous report to the 31st Washington Legislature, January, 1949, with having committed perjury before it, and with having been closely associated with twelve organizations which had been officially cited as Communist fronts and subversive (P-T.O. 117). Subsequent investigations by University of Washington President, Raymond Allen, and others, proved beyond all doubt that the charges of Washington's Committee on Un-American Activities were absolutely false and without foundation, and Professor Rader, in a libel suit, later collected damages from the chairman of that committee, Mr. A. F. Canwell. A Report of the Rader Case appears in Countryman, Un-American Activities in the State of Washington (1951) (P-T.O. 116-118).

There can be no doubt of Professor Rader's commitment to the Constitution of the United States and its Bill of Rights, and he has twice been chairman of the American Civil Liberties Union of Washington (P-T.O. 118).

Nevertheless, several facts remain: three sworn witnesses impinged upon his truthful testimony; an official committee of the State Legislature unanimously charged him with false swearing; a New York judge asserted that Professor Rader should be the subject of a grand jury investigation; his reputation was clouded; Professor Rader's academic employment was in jeopardy for a year, and his credit rating fell (P-T.O. 118).

The attacks made upon him are not events of the remote past, but continue to the present day, due, in part, to the past record. Professor Rader has continued to be the subject of recent attacks, made by newspaper and otherwise, to the effect that he is still a member of communist front organizations; that he continues to hew to the communist party line, and that he is a master of deceit, each of which is false. Professor Rader cannot sign the oaths, because, were he to do so, then, it is not at all unlikely that he would be charged with perjury (P-T.O. 118).

It would unduly lengthen this statement to review the history of each remaining appellant. They have distinguished themselves in many ways, bringing scholarly respect to the University of Washington. For many of them, the performance of their academic duties necessarily brings them into close collaboration and association with communists, and they frequently teach, advise and aid communists in many ways, and by many means, some of which may very well help the Soviet Union and Communist China achieve their military and other purposes. A few of the many achievements and academic distinc-

tions, along with several of their necessary associations with communists, do appear in the pre-trial order (e.g., see Drs. Wilcox, Dawson, Fleagle, English, and Keller. P-T.O. 102-104 and Professor Valentine at pages 107-109).

Two appellants, Drs. Matchett and Orians, and others similarly situated, are members of the religious order known as the Society of Friends (Quakers) (P-T.O. 100). They refuse to execute the oaths on religious grounds which are protected by the First Amendment to the Constitution of the United States of America.

Additional Operative Facts

It has been expressly agreed and stipulated that at all times material to the issues in this case, appellants, and others similarly situated, have refused to sign all oath forms which have been demanded of them and continue to do so; that appellants, and others similarly situated, have no speedy or adequate remedy at law, and that "unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants) and others similarly situated, will suffer irreparable injury not compensable in monetary damages" (P-T.O. 87).

Appellees, defendants below, are members of the Board of Regents, Charles E. Odegaard, President of the University, and John J. O'Connell, Attorney General for the State of Washington.

Since the 1955 statute, in question in this suit, was enjoined for seven years from 1955 to 1962, appellees dur-

ing that time required no oaths, either the oath required by the 1955 or 1931 statute, of any employee, and none was administered to employees of the University of Washington (P-T.O. 81-84). During that time, and to the present, the appellees, Board of Regents, President of the University and the Attorney General, have been and are without knowledge that any University of Washington faculty member, students, graduates or ex-students or any guest, visitor or listener to public lectures at the University of Washington has been charged in any judicial proceeding brought under the Washington Subversive Activities Act (P-T.O. 98).

Additionally, no official agency of government, local, state or federal, has brought facts to the attention of any of the appellees that, as a result of the teachings and activities of appellants, and others similarly situated, any student or ex-student of the University is in violation of Washington's Subversive Activities Act, and further, appellees are without knowledge that any appellant, or others similarly situated, in any way, uses his position of employment to engage in or promote activities designed to achieve the violent overthrow, by force, of national or state governments (P-T.O. 98-99).

Dr. Charles E. Odegaard, President of the University of Washington, stated that oath forms A and B (absent statutory requirements) are not necessary qualifications of fitness to teach or to do research at the University of Washington; that the existing recruitment and personnel procedures practiced at the University during the past seven years, as improved from time to time, are adequate

to protect the legitimate public interest in securing qualified and trustworthy personnel, and that some qualified applicants for academic positions have been reluctant to accept employment on the condition of executing oath forms A or B.

Glenn Leggett, Vice Provost of the University of Washington, is in charge of supervising academic personnel records. He stated that a physicist who previously had been hired by the University of Washington, resigned, accepting a position at the University of Birmingham [Birmingham-Southern at Birmingham, Alabama], when informed that execution of the oaths, required by the statutes here in question, were conditions precedent to academic employment; that, in 1962, after dissolution of the injunction in *Nostrand v. Little, supra*, and the resumption of the oath requirements, several executive officers of the University indicated to him that the University would be less successful in its academic recruitment policy, and further, that one professor who was then negotiating an academic appointment with the Department of Philosophy, refused a position at the University of Washington because, in part, he would have to execute the oaths in issue in this case before he could qualify for academic employment as a philosopher (P-T.O. 97).

In accordance with the facts of their knowledge, appellants can testify that they have not, and do not, use their positions of employment at the University of Washington in any such ways as knowingly to bring about violent overthrow, by force, of state or national governments (P-T.O. 88). Furthermore, each appellant is of the con-

viction that if he were to execute the required oaths, then he would suffer emotional anguish and would have to compromise his principles, beliefs and consciences; that he may subject himself to harassment, and further, to the threat of loss of employment and/or prosecution for perjury, and that the demands of the State of Washington that he sign the oaths in question are affronts to his personal and professional integrity, and that they constitute an abridgement of his civil liberties and constitutional rights secured and guaranteed under the Constitution of the United States of America (P-T.O. 99).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial in that they directly raise fundamental constitutional issues with respect to the power of state legislatures, as a condition of continued employment, and without affording a hearing, to compel all faculty members, tenured and non-tenured, alien and citizen, and all other employees, who are now employed and otherwise fully qualified for their positions at a state university, to execute two broad and vague oaths, each of which abridges the faculty members' and other employees' constitutional freedoms protected by the Constitution of the United States. Affecting the nature and role of a free university in our society, academic freedom, and the constitutional rights of state employees and faculty members, the problems involved in this case are of an equally significant or greater magnitude than those considered on appeal by this Court in cases involving state promotion of patriotism or state loyalty programs: e.g., *West Virginia v. Barnette*, 319 U.S. 624;

Garner v. Bd. of Pub. Wks., 341 U.S. 716; *Adler v. Bd. of Ed.*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Ed.*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Beilan v. Bd. of Ed.*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Speiser v. Randall*, 357 U.S. 513; *Nelson v. Los Angeles*, 362 U.S. 1; *Shelton v. Tucker*, 364 U.S. 479; *Konigsberg v. California*, 353 U.S. 252 and 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82; and *Cramp v. Florida*, 368 U.S. 278. The constitutional issues here presented, particularly the First Amendment issues, have not been considered and set to rest by this Court. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234 and *Garner v. Bd. of Pub. Wks.*, 341 U.S. 716.

As to all questions here presented the United States District Court, Western District of Washington, Northern Division, upheld the state statutes against serious and substantial claims that they were, and are, repugnant to certain provisions of the United States Constitution. The validity of each of these claims, and the substantial nature of the issues raised in this appeal, are considered below. The questions will be discussed seriatim, except that those questions presenting common problems will be discussed as a unit. Hence, questions A-1a, b, c and d, which present common First Amendment problems, will be discussed under roman numeral I; questions 5 and 6 under roman numeral VII, and questions 8 and 9 will be discussed together under roman numeral IX.

I.

The Court Below Upheld the Penalization of All Advocacy of the Prohibited Doctrines and All State Prohibitions on Membership Whether or Not the Restrictions Prevented Any Evil, Thereby Depriving Appellants, and Others Similarly Situated, of Freedoms of Thought, Privacy of Conscience, Religion, Speech, Association and Assembly, Without Due Process of Law in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

In no case has this Court fully explored and adjudicated the question as to the exact point at which the First Amendment, through the Fourteenth, operates as a limitation upon state authority to compel state employees, particularly faculty members, to execute oaths as conditions of their continued employment at a university. Although a somewhat similar question was presented in *Garner v. Bd. of Pub. Wks.*, 341 U.S. 716, this Court did not explore and adjudicate the First Amendment question presented by this case. In *Garner*, this Court considered only the Bill of Attainder and *ex post facto* aspects of the Oath. This Court assumed that knowledge was part of the *Garner* oath and did not consider, nor adjudicate, whether knowledge alone insulates every oath from infringing upon First Amendment freedoms. Subsequent cases indicate that knowledge alone is not sufficient. *Speiser v. Randall*, 357 U.S. 513; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278. Thus, there is need to reconcile these cases and to locate the point at which the First Amendment operates as a limitation on state power to require oaths as a condition of state employment. This question is cleanly brought to issue in this case which un-

equivocally pits the First Amendment claims to freedom of religion, free speech and private association, including academic freedom, by faculty members and other employees, at the University of Washington, against the requirement that, as a condition of their continued employment, all members of the teaching faculty must execute two required oaths, and that all other employees must execute one of the two oaths.

This Court's disposition in *Gerende v. Bd. of Supervisors*, 341 U.S. 56, does not foreclose this appeal because *Gerende* did not present the issues which are presented by this case. In *Gerende* this Court affirmed the judgment of the Maryland Court of Appeals on the understanding that "a candidate need only make oath that he is not a person who is engaged in one way or another in the attempt to overthrow the government by *force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt." This Court did not have before it the much broader and pervasive Section 15 of Maryland's Ober Act which defined a "subversive person" in language identical to that involved in this case. The Maryland Court had held that Section 15 did not apply to *Gerende*, *Shub v. Simpson*, 76 A.(2d) 332, at 341, thus the questions presented in this case have not been prejudiced by *Gerende*.

Nor do the employee dismissal cases foreclose the issues presented here. In *Beilan v. Bd. of Ed.*, 357 U.S. 399, a public school teacher was discharged for "incompetency" under § 1122 of the Pennsylvania Public School Code, because of his refusal, continued after a warning that failure

to answer might lead to his dismissal, and after a hearing, to answer a question of his superintendent as to his membership in the Communist Political Association. This section of the Pennsylvania Code was not in issue in *Beilan*; whereas the Washington statutes are in issue in this case. But, more importantly, the procedures in *Beilan* were designed for identification and informational purposes only and not for exclusionary and dismissal purposes as are the Washington oaths. Thus, in *Beilan* the question before this Court was whether *Beilan* could be discharged for blocking a legitimate inquiry of the state for identification and informational purposes. There is nothing in *Beilan* that holds that a state may discharge a person because he reveals that he is a member of the Communist Political Association. However, the case at bar does not present appellants with the middle ground of *Beilan* where they might give the demanded information and retain employment. A person must execute the oaths, questioned in this case, in order to be eligible for state employment; thus, the statutes here function to exclude employees from continued state employment, and they do so without a meaningful hearing, present in *Beilan*, where appellants might explain or justify their refusal to execute the oaths. Furthermore, the oaths here present a broadside attack on First Amendment liberties, going well beyond the simple question put to *Beilan* (see infra). Thus, in their breadth and in their broadside manner of infringement, the oaths demanded of appellants raise substantial questions under *Shelton v. Tucker*, 364 U.S. 479, a case not decided at the time of the *Beilan* decision. Also, *Beilan* did involve a selective and less drastic approach to the problem than do

the oaths in this case. For these same reasons *Lerner v. Casey*, 357 U.S. 468, and *Nelson v. Los Angeles*, 362 U.S. 1, do not prejudice the questions presented in this appeal.

Other cases, such as *Konigsberg v. California*, 353 U.S. 252 and 366 U. S. 36, and *In re Anastaplo*, 366 U.S. 82, do not decide the issues presented in this case for many of the same reasons discussed above with reference to *Beilan*. But, in addition to those reasons, there is another. This Court has clearly indicated that there is a difference between a state offering a "privilege" and a state legislating conditions of state employment. *Konigsberg* and *Anastaplo* were decided on the theory that bar admission was a privilege:

> "Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications . . ." *(In re Anastaplo*, 366 U.S. 82 at 90.)

This Court, subsequent to *Adler v. Bd. of Ed.*, 342 U.S. 485, has clearly indicated that state employment does not fall into the "privilege" classification. *Wieman v. Updegraff*, 344 U.S. 183 at 192; *Torcaso v. Watkins*, 367 U.S. 488 at 495-96, and *Cramp v. Florida*, 368 U.S. 278.

However, as noted above, *Adler, supra*, was decided, in part, on the now discredited "privilege-of-state-employment" reasoning, and hence, either it loses much of its vitality, or the conflict in the opinions of this Court on this point indicate that the case at bar presents a substantial federal question. Furthermore, *Adler* was decided before this Court fully recognized constitutional protection for the right to private association, *NAACP v. Alabama*, 357

U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516, relied upon here by appellants, thus *Adler's* holding that unexplained membership in a "subversive organization" might qualify as grounds for the dismissal of a teacher has been seriously impaired by this Court's cases subsequent to *Adler*.

In addition, *Adler's* holding does not foreclose this appeal because *Adler* was decided within the framework of viewing the state as a seeker of information, i.e., identification, a legitimate state purpose, and provision for a meaningful hearing was afforded to the teachers. As pointed out above, Washington's oaths do not serve the purpose of information, i.e., identification, but rather, they are exclusionary, locating a class of persons who are eligible for employment, or continued employment, and locating them on the basis of their beliefs, speech and associations. No meaningful hearing is afforded in the case at bar. Finally, *Adler's* rationale and holding have been seriously undermined by two subsequent decisions of this Court; *Wieman v. Updegraff*, 344 U.S. 183, and *Speiser v. Randall*, 357 U.S. 513, and by the fact that *Adler* followed precedent *(Garner)* which was not in point. *Adler* decided that unexplained membership in a "subversive organization" might qualify a teacher for dismissal. This means that the teacher is considered as being a member of a subversive organization, and if he refuses to explain his membership, the question was whether he can be discharged. In *Adler*, the teacher was held to be a member of the organization, and, at page 492, this Court cited *Garner v. Bd. of Public Works, supra*, for its precedent on this point. However,

Garner, at page 720, expressly said:

> "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U.S.A.] justifies his discharge."

Thus, it is clear then, in another respect *Adler* is defective, and cannot be relied upon to govern the issues presented in this case.

It should be pointed out that when an earlier case, involving two tenured professors who questioned the 1955 oath statute, was on appeal from the Washington Supreme Court and was before this Court, it noted probable jurisdiction, believing a substantial federal question to be presented *Nostrand v. Balmer*, 361 U.S. 873. After briefs, hearing and oral argument on the merits, this Court invoked the principle of comity, and remanded that case for a determination whether the 1955 oath statute, in question here, afforded a hearing to tenured professors at the University of Washington. *Nostrand v. Little*, 362 U.S. 474. On remand, the Washington Supreme Court held "that the professors are not entitled to a hearing under § 15 of the 1951 act, but, as stated above, are entitled to a hearing before the tenure committee, because the rules and regulations adopted by the regents (which form a part of their contracts of employment) so provide." *Nostrand v. Little*, 58 Wn.(2d) 111 at 132. On re-appeal, this Court, over dissent, held that "the appeal is dismissed for want of a substantial federal question." *Nostrand v. Little*, 368 U.S. 436.

After the dismissal for want of a substantial federal

question, the tenure code of the University of Washington was amended by the Board of Regents, adding another ground for dismissal of tenured faculty: failure to execute the oaths in question in this case. Thus, the hearing afforded by the tenure code to tenured faculty members becomes a sham and a nullity. Furthermore, this case, a class action, presents also the interests of non-tenured faculty members not present in *Nostrand v. Little, supra,* who expressly receive no hearing under the tenure code, but some of whom have renewable three-year contracts, thus distinguishing their interest from that of Globe in *Nelson v. Los Angeles*, 362 U.S. 1. This case also involves the interests of other state employees and students at the University of Washington. In addition, this case presents for adjudication an oath, the 1931 oath, not involved in *Nostrand v. Little, supra,* and it is undisputed that the 1931 statute clearly does not afford anyone a hearing before dismissal. Thus, given the nature of this case, we submit it is not controlled by the ruling in *Nostrand v. Little, supra,* dismissing for want of a substantial federal question. To the contrary, we submit this case presents many substantial federal questions, some of which were presented, but not decided, in *Nostrand v. Balmer, supra,* where this Court noted probable jurisdiction.

Discussion of Issues

It is clear that the Washington legislature has no power under the First and Fourteenth Amendments to require, as a condition of state employment, that all state employees execute oaths that either they are, or are not, Jews, Catholics or Protestants, or execute oaths that either they are, or are not, members of the Republican or Democratic

parties, or execute oaths that either they do, or do not, advocate, abet, advise or teach by any means the desirability of governmental subsidization of contraceptives as a means of population control. Such oaths, as conditions of employment, would obviously contravene the mandate of the First Amendment, even though, like the Washington oaths, they carried the requirement of knowledge. Wherever this Court may draw the line as to the exact point at which the First Amendment does operate as a limitation on state authority, we submit that the legislature of the State of Washington has over-stepped that boundary line in this case.

The effort by the Board of Regents of the University of Washington to carry out their statutory duties and to force appellants, and others similarly situated, to execute the two oaths, which abridge fundamental liberties, on the pain of loss of their academic employment for which they have spent many years preparing themselves, raises squarely issues of freedom of speech and association in one of its most significant and sensitive aspects—the area of academic freedom. In essence, the attempt of the Washington legislature brings potent sanctions to bear upon the beliefs and attitudes of faculty members, curtailing and repressing academic inquiry and discussion, as well as political association. Such conduct on the part of a state government runs directly counter to the principles of free conscience, discussion and association which underlie our democratic form of government and which are embodied in the First and Fourteenth Amendments as consistently interpreted by the decisions of this Court.

The free exercise of the constitutionally protected free-

doms of religion, speech, private association and academic freedom of appellants, and others similarly situated, will be substantially interfered with, and materially abridged, by the statutory requirements that appellants, and others similarly situated, execute the oaths as a condition of continued employment. This invasion of protected liberties is an uncontested and admitted fact:

> "Unless defendants are restrained from enforcing provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants), and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (P-T.O. 87.)

The undoubted encroachment upon appellants' free exercise of the above liberties is further corroborated by the statements of Professors Holt (P-T.O. 105), Valentine (P-T.O. 107), Read (P-T.O. 110), Murphey (P-T.O. 112), Rader (P-T.O. 115), Dietrichson (P-T.O. 119), and Wilcox, Dawson, Fleagle, English and Keller (P-T.O. 101-102) plus the deposition of Professor Z. W. Birnbaum. Of the infringement upon, and deterrence of, protected liberties there can be no question.

The power of the legislature to require oaths from state employees, including university professors, fully as much as the power of legislative investigation (*Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539), must, at some point, be checked by the countervailing command of the First Amendment. This Court has consistently taken the position that state power is subject to such limitations, and it repeatedly has held that a state does not have power to enact any type of oath it could

conceivably choose. For example, a state has no power to require oaths, as conditions of employment, which do not carry a requirement of knowledge (*Wieman v. Updegraff*, 344 U.S. 183); nor does it have power to prescribe oaths, which, although requiring knowledge, are, nonetheless, vague and not susceptible of objective measurement (*Cramp v. Florida*, 368 U.S. 278); nor, significantly for this case, does a state have power to require certain statements, made under oath, from teachers which "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," although the knowledge requirement might be present, and although the governmental purpose might be "legitimate and substantial." (*Shelton v. Tucker*, 364 U.S. 479 at 488.) We submit that the Washington legislature in this case has broadly encroached upon fundamental liberties, contrary to the First Amendment's limitation on state power, and that the state's legitimate interest could more narrowly be achieved by using procedures which are already in existence, without recourse to the statutes requiring the two oaths.

No one questions the power of a state legislature, subject to overriding federal power, to enact legislation prohibiting acts of violence to overthrow, destroy or alter constitutional forms of government. Furthermore, under *Dennis v. U.S.*, 341 U.S. 494, a state may proscribe the direct advocacy of immediate force or violence for such purposes, whether by individuals or by organizations. The Washington legislature, in 1909, exercised this power and enacted Washington's criminal anarchy and sabotage statutes (RCW 9.05 et seq.), not in issue here. The power of the

state extends to these areas, and Washington's criminal anarchy and sabotage statute occupies these areas fully. But, the state clearly has no power, by reason of the First and Fourteenth Amendments, to prohibit, or unduly burden, by way of oath, or by way of defining a crime, academic or political activity, association or discussion which is directed toward political or social change through peaceful, democratic methods. *Stromberg v. California*, 283 U.S. 359; *De Jonge v. Oregon*, 299 U.S. 353; *Taylor v. Mississippi*, 319 U.S. 583; *Terminiello v. Chicago*, 337 U.S. 1; and see *Sweezy v. New Hampshire*, 354 U.S. 234; *NAACP v. Alabama*, 357 U.S. 449; *Speiser v. Randall*, 357 U.S. 513; *Bates v. Little Rock*, 361 U.S. 516; *Shelton v. Tucker*, 364 U.S. 479; *NAACP v. Button*, 371 U.S. 415, and *Gibson v. Florida*, 372 U.S. 539.

Nor does a state have any power to prevent academic discussions of political and social issues, even where those discussions may directly relate to the doctrines of bloody revolution, force and violence. *Dennis v. U.S.*, 341 U.S. 494, at 501-2. This Court has drawn a sharp line between advocacy of forcible overthrow and the incitement of action to that end. *Yates v. U.S.*, 354 U.S. 298. Nor does a state possess constitutional power to prohibit or forbid knowing, but inactive, membership in the American Communist Party. Such membership might be held by one who is foolish, deluded or optimistic, but he cannot be made a criminal because of it. *Scales v. U.S.*, 367 U.S. 203 at 229-30. Counsel submit that a person, other than members of the F.B.I., could also be a member of the Communist Party for purposes of studying it and for the scholarly pur-

pose of obtaining first-hand information about its character and social significance in our society.

State power to legislate in these areas, including legislative prescription of oaths, with their enormous capacity for restraint and suppression, is excluded because "where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh v. Alabama*, 326 U.S. 501 at 511. The State, even as an employer, is still subject to the requirements of the Constitution.

Yet, it is precisely these constitutionally forbidden areas that the Washington legislature seeks to invade when it demands that, as a condition of continued employment, appellants, and others, execute the oaths here at issue.

A. The Breadth of the Oaths Here in Issue Affects the Rights and Liberties of All State Employees, Particularly Those of Professors and Socially Conscious Organizations.

The extent of the invasions of liberty can be measured by the sweep of the various statutes which serve to define the oaths.

The Unconstitutional Breadth of the 1955 Disclaimer Oath

It is important to remember that the Washington State Supreme Court has carefully reviewed the sweeping breadth of the statutes defining the 1955 disclaimer oath. In an opinion, discussing *Shelton v. Tucker*, 364 U.S. 479, and other cases, the Washington Supreme Court declared that: "Unlike the Arkansas statute, our act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The opinion of the District Court, below, considered *Sweezy v. New Hampshire, supra, Shelton v. Tucker, supra,* and *Cramp v. Florida,* 368 U.S. 278, and other cases. The District Court agreed with the Washington Court, holding:

> "Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers. But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading: namely, that the oath does not require any statement as to political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from membership in any kind of association whatever, *except* those associations which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force, or violence."

"Foreign Subversive Organization"

That the District Court is flatly in error and misunderstands the breadth of the 1955 disclaimer oath is clearly demonstrated by reading the statutory definition of "Foreign Subversive Organization" which in no way is qualified and limited in its application only to those associations seeking change in government *by revolution, force, or violence*. The "foreign subversive organization" section, in its permutations and combinations, confronts an affiant with 16,200 questions, each of which is required by statute, and which an affiant must disclaim or be ineligible for state employment. There is no middle ground. Not one question is limited to membership in associations willing to use force or violence or engage in revolution

as a means for social or political change (See Exhibit 14, pages 47 to 52).

One example will suffice: "Foreign subversive organization means any organization directed . . . indirectly by a foreign government . . . a purpose of which is to advocate . . . activities intended to . . . assist in . . . the alteration of the constitutional form of government of the United States or the State of Washington . . . and to establish in place thereof any form of government the direction and control of which is to be vested in . . . any foreign government, organization or individual." In application then, if the government of Australia were to advocate that we in America alter our constitution, by amendment, to vest direction and control over nuclear weapons, and other military decisions, in the United Nations, then, according to this definition, each citizen of Australia, Professor Kenneth E. Read, appellant here (P-T.O. 110-111), would be a member of a "foreign subversive organization" and ineligible for professorial employment at the University of Washington. Counsel cannot advise Professors Rhoads Murphey or Z. W. Birnbaum, and many others at the University of Washington, (see statement of the case, *supra*) that they are not members of foreign subversive organizations, as defined by this statute. The expansive breadth of this section clearly transgresses the bounds of legitimate state power and is unconstitutional under the First and Fourteenth Amendments.

"Subversive Person"

"Subversive persons" are defined by many gradations of speech and associations. But, as this Court pointed out

in *Sweezy v. New Hampshire*, 354 U.S. 234 at 246, when it had statutes before it identical in wording with those in this case: this Court's "interest is in the minimal requirements of that definition since they will outline its reach." Accordingly, a "subversive person" is "any person who . . . teaches by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government of the United States, or of the State of Washington . . . by revolution, force or violence;" Thus, a professor who teaches his students "by any means" that the American Revolution was justified under the circumstances set forth in the Declaration of Independence, and that revolution would again be justified if American government degenerated to those conditions, would, by this definition, be a "subversive person." The "subversive person" section, in its permutations and combinations, presents 34,290 separate questions to an affiant, which he must disclaim or be ineligible for continued employment. There is no middle ground (Ex. 14, pp. 53-57).

Each question reveals the potential sweep of the statutory definition of a "subversive person" and that it extends to speech and conduct which is only remotely related to actual subversion. When judging this section, this Court's comments on an identically worded statute were not followed by the District Court:

> "The possible remoteness from armed insurrection of conduct that could satisfy these criteria is obvious from the language. The statute goes well beyond those who are engaged in efforts designed to alter the form of the government by force or violence. The statute declares, in effect, that the assistant of an

assistant is caught up in the definition." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 246.)

"*Subversive Organization*"

Washington's 1955 oath's final definition, that of "subversive organization," is sweepingly broad. A "subversive organization" is "any organization . . . a purpose of which is to . . . teach activities intended . . . to assist in the . . . alteration of . . . government . . . by revolution, force and violence." Again, an assistant to an assistant is caught up by this definition, and it matters not whether the group be temporary or permanent. Suppose that a group were in existence only for the purpose of advancing all views on every subject, including, as one of its many views that of abetting, advising, or teaching, by any means, activities intended to assist another group in its attempts, or in its assistance to others who desire to alter government in the prohibited manner. Knowing membership in this first group is enough to qualify one as "subversive"; it need not be active membership. It is not possible under this statute, for a group member who is opposed to one of the group's purposes, say the one prohibited by this Washington statute, to remain a member of the group and to become, or remain, a state employee, even though he dissents from that particular purpose, is not active, and believes that the group as a whole is worthwhile. This is guilt by association.

In many cases—which were rejected by the District Court—this Court has held that government has no power to prohibit or punish mere knowing membership in the Communist Party, if it is not "active." Otherwise, the

principle of guilt by association, foreign to our law, would be approved. *Scales v. U.S.*, 367 U.S. 203; *Noto v. U.S.*, 367 U.S. 290; *Yates v. U.S.*, 354 U.S. 298, and *Dennis v. U.S.*, 341 U.S. 494. It is clear that Washington has no power to incorporate the principle of guilt by association into her employment policies. It surely cannot go beyond inactive, but knowing membership in the Communist Party, if that far, and prohibit absolutely all state employment to those persons who are members of "subversive organizations." Furthermore, this Court has held that the First Amendment grants to every citizen the constitutional right to advocate violent overthrow of government so long as he does not incite others to unlawful action:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." (*Noto v. U.S.*, 367 U.S. 290 at 298).

Yet, it is exactly these, and other constitutional rights to liberty and association, that Washington insists each of its employees must give up as a condition precedent to their qualifying for employment. This Court has held these rights to be immune from the indiscriminate reach of state power.

It is no answer to argue that state employment is a "privilege" and not a "right," and then infer that the infringements here are permissible because they infringe upon no rights. This Court has set that issue at rest, holding:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." (*Wieman v. Updegraff*, 344 U.S. 183 at 192; expressly confirmed in *Torcaso v. Watkins*, 367 U.S. 488, 495-96, and in *Cramp v. Florida*, 368 U.S. 278.)

We submit that the unlimited and indiscriminate sweep of the statutes defining the 1955 disclaimer oath bring them within the ban of this Court's prior cases and that the statutes' comprehensive interferences with freedom of speech and association go far beyond what might be justified in the exercise of the state's legitimate conditions of employment for its professors and other employees.

The Unconstitutional Breadth of the 1931 Oath of Undivided Allegiance

The 1931 oath of undivided allegiance to government is likewise a broad intrusion of state power into areas forbidden the state by the First and Fourteenth Amendments. The sweep of this oath is measured by its requirement that every professor must solemnly swear that he "will by precept and example promote":

1. "respect for the flag and"

2. "the institutions of the United States of America and the State of Washington,"

3. "reverence for law and order" and

4. "undivided allegiance to the government of the United States."

This oath is an annual oath applying not only to cer-

tification and to every new teaching contract, but also to the renewal of every teaching contract in the State of Washington. Its purpose is clearly that of promoting patriotism, a purpose heretofore held insufficient by this Court as a justification for abridging freedom of speech, association, and conscience. *West Va. v. Barnette*, 319 U.S. 624. The oath seeks to achieve its goal of patriotism by requiring, among other things, that a professor give up his independence of mind and conscience and swear that he will promote by precept and example undivided allegiance to the government of the United States. Thus, this oath strikes at the very heart of free conscience, speech, and association, and seeks to impose upon all professors a thought-stifling and action-conforming nationalistic orthodoxy contrary to the clear mandate of this Court that:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *(West Va. v. Barnette*, 319 U.S. 624 at 642, and see *Engel v. Vitale*, 370 U.S. 421 at 425, where this Court denied that government had constitutional power to compose prayers and require supplication to them as part of a governmental program to further all religious beliefs.)

Yet, it is precisely these forbidden areas that the Washington legislature seeks to reach. It seeks to force professors by word (precept) and act (example) to confess their faith in an orthodox nationalism (undivided alle-

giance to the government of the United States),—all to the abridgement and detriment of the professors' constitutionally protected freedom of religion, conscience, speech and association. Of the unconstitutional invasions into these areas there can be no doubt. Also, there can be no doubt of the consequences if a professor fails to execute the 1931 oath, because the statute provides that if "any person or persons . . . fail or refuse to execute the oath . . . any contract executed or renewed, or license issued in violation hereof shall be and is hereby declared to be null and void." The statute operates summarily.

Although alleging that it would not do so, the District Court did pass upon the constitutionality of the 1931 statute, at least insofar as it involves freedom of speech, association, and conscience. The District Court held: "Insofar as the arguments heretofore considered with respect to the loyalty oath [the 1955 disclaimer oath] are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the District Court committed error and that under our constitutional system, the coercion of undivided allegiance to government is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." *(Cramer v. U.S.*, 325 U.S. 1 at 21.)

The American tradition is eternally hostile toward every

form of tyranny over the mind of man. In the realm of reason and conscience *(West Va. v. Barnette, supra)* as well as in the realm of conduct *(Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts are incompatible with a free society. Those who equate loyalty with conformity misconceive the American tradition. Under the pressure of such legislative misconceptions, professors, in order to exercise their profession, are, in effect, compelled to hold opinions on academic, political and social matters as they have been prescribed by the Washington State legislature. To uphold this power would go too far. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)).

B. The Oaths and Possible Perjury Prosecutions

The indiscriminate breadth of these statutes takes on particular significance when one considers the possibilities of a perjury prosecution for falsely executing these oaths. At one time, perhaps, the threat of prosecutions may have been rare. But, today, our society has witnessed a rising movement in the name of anti-communism. Professional anti-communism is dangerously close to becoming as doctrinaire as communism itself—and may, indeed in some areas it does, embrace the root evil of totalitarianism—intolerance. (See, Bell, D., (ed), The Radical Right (1963); Sherwin, The Extremists (1963); Ellsworth, R.

and Harris, S., The American Right Wing (1962); Suall, I., The American Ultras (1962); First National Directory of Rightist Groups (1962); Gould, G., Inside the Birch Society (1961)). The presence of these groups in our society means that there are now jurymen who might quite likely convict for perjury on the basis of the Washington statutes set forth above.

If a professor were prosecuted for perjury, before such jurymen, much of the evidence would, most likely, come from students who sat in his classes. Given the now realistic threat of prosecution for perjury; today's anti-communist attitudes, and the possibility of student testimony against him, what professor can execute the oaths in question here and then courageously proceed openly and fairly to discuss the controversial social issues present in today's society? Could Professor Rader continue to discuss Marxism or Communism or Democracy? It matters little whether the perjury prosecution is successful. The threat of such a prosecution would cast a pall of orthodoxy over the classroom. It is an old and ugly subtlety to strike freedom of the mind in the name of patriotism with the fist of loyalty. Given the threat of prosecution, Professors will fear a continuing surveillance of their teachings and activities, to sift their loyal words from the disloyal. Discussion will end where it should begin; orthodoxy will prevail. There can be no academic freedom in such a situation. "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect." *Adler v. Bd. of Ed.*, 342 U.S. 485 at 510 (dissenting opinion).

That these are not idle fears is clearly revealed by the course of recent events. Three students at the University of Indiana, members of a student group known as the Young Socialist Alliance, were recently indicted by an Indiana grand jury for having violated that state's anti-communist statute which is worded with extremely similar terms to those in question here. The indictments are reported to charge that the three students assembled "for the purpose of advocating or teaching the doctrine that Government . . . should be overthrown by force, violence or unlawful means . . ." *The New York Times*, Western Edition, for Friday, May 3, 1963 at page 9 reports as follows:

> "'The important thing in this case,' Mr. Hoadley [Monroe County, Indiana, prosecuting attorney] said, 'is to get this organization off the campus. The University is a department of State Government'."

The State of Washington, too, has a strong component of anti-communists within its boundaries (see, Gottfried, A. and Davidson, S. The New Right in Action, *The Nation*, July 29, 1961, reprinted in Hearings, Subcommittee of the Senate Judiciary Committee to Investigate Attacks on the Internal Security Act, August, 1961). Thus, it is not idle when appellants state, in the record of this case, that they fear that if they executed either Oath Forms A or B that they may subject themselves to harassment and the threat of prosecution for perjury." (P-T.O. 99.)

This Court appears to have looked ahead to this day when it said that it "would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they

violently oppose." And, realistically, "experience teaches that prosecutors too are human." *Cramp v. Florida*, 368 U.S. 278 at 286-7. The record in this case amply supports the fears of appellants:

> "What I fear if I sign the oath is that I would have to compromise my conscience and my professional obligation to search for truth and that some member of the class will report my statements about the past improper actions of the United States and that I will be charged with perjury on the grounds that I am a 'subversive person' or that I am violating the oath [of undivided allegiance]. Various super-patriotic societies, like the John Birch Society, collect from students statements made by professors in their classes. I do not believe that I can execute Oath Form A and continue to discuss these matters as I have in the past." (Statement of Professor W. Stull Holt, P-T.O. 106.)

Professor Rhoads Murphey (P-T.O. 113) has stated: "If I signed the oath, I would not feel that I could discuss them [certain controversial issues], or encourage students to discuss them, and hence would not feel that I could in honesty teach." And at P-T.O. 112, "Whether I remain at the University of Washington will depend upon the outcome of this suit." The record is replete with such realistic statements, (see, P-T.O. 107-109, Professor Valentine; pp. 115-119; Professor Rader; pp. 120-121, Professor Dietrichson). These statements have not been impeached and they are in the record. There is nothing in the record to contradict them or to weaken them. They are true.

Nevertheless, the District Court casually dismissed all argument on this point:

> *"It has not been shown that upon subscribing to*

the 'disclaimer' oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public hysteria or the temper of the times might conceivably at some future time bring about such a result *we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge.* It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms; nor are we constrained to find its language to be vague and uncertain." (Emphasis supplied.)

We submit that the lower court committed error when it made the wrong substantive decision on this point when it assumed the existence of facts not found in the record of this case, and when, in deciding the issue, it ignored facts inescapably found in the record.

C. The Court Below Upheld Infringements on Free Expression and Conscience Without Any Showing of Nexus or a Subordinating State Interest Which Is Compelling.

There are other reasons why the First and Fourteenth Amendments prevent the State of Washington from extracting these two oaths from appellants, and others, as conditions of their continued employment. As has been shown above, the two oaths seriously infringe upon freedom of thought, conscience, speech, and association. They can be justified, if at all, only if (1) the State of Washington clearly has a subordinating interest which is compelling and only if (2) there exists some nexus between appellants, and others, and the subordinating state interest. Otherwise, the mandate of the First Amendment must

prevail. These two elements will be discussed in reverse order to their presentation above.

There Is No Nexus Shown by This Record

This Court recently has clarified the concept of Nexus, saying that "regardless of the label applied, be it 'nexus,' 'foundation,' or whatever, . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition *that the state convincingly show a substantial relation* between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida*, 372 U.S. 539 at 546 (emphasis supplied). This nexus must be shown in order to justify the oaths. *Am. Comm. Assn. v. Douds*, 339 U.S. 382.

To decide the nexus question the District Court must look to the facts in this record to ascertain whether the required nexus has been supplied by the state, defendant-appellees here. Although counsel for appellants urged this course upon the District Court, it held that:

> "*It must be presumed* that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation." (Emphasis supplied.)

Thus, the District Court sustained the constitutionality of the Washington legislation by way of "presumption." In doing so it not only ignored the mandate of this Court on the Nexus point, but also, the District Court assumed

two deviations from the actual facts of this particular case; first it assumed a state of facts which the record does not support, and secondly, it refused to consider facts which are clearly in the record in this case. For example, the District Court refused to consider a carefully worked out agreed fact that appellants do not knowingly use their employment at the University of Washington, through teaching, or in any other way, in attempts to bring about violent or forceful overthrow of government (P-T.O. 88). Neither the Attorney General for the State of Washington, nor the Board of Regents of the University, or its President, possess any information indicating that any appellant, or others similarly situated, is a member of the Communist Party, or is a "subversive person," or that any appellant, or others similarly situated, has influenced anyone else to become a "subversive person" or a member of a "subversive organization." (P-T.O. 97, 98.) In other words, the District Court refused to consider facts which positively show that there is no nexus between appellants, and others, at the University of Washington, and subversive activities in the State of Washington.

In addition, the District Court refused to consider other relevant facts. The Washington Committee on Un-American Activities made its report, significant portions of which have been conclusively shown to be false (P-T.O. 115-118), at the beginning of the 31st Washington Legislature in January 1949. Meeting in full session immediately thereafter that legislature enacted no legislation on the basis of its committee report.

At the time when that legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive, as reported by the legislative committee. See, Countryman, *Un-American Activities in the State of Washington,* Ch. VI, "Investigation by the University," pp. 186-285 (1951). As reported by the University President, Raymond B. Allen:

> "On January 22, 1949, the Board of Regents of the University of Washington took final action in six tenure cases which for more than six months had been before various faculty and administrative officers and agencies. The action of the Regents consisted of the dismissal, as of February 1, of three professors and the retention of three others on two-year probation subject to the requirement that they sign and file with the President of the University affidavits that they are not now members of the Communist Party." *(Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington 11 (1949).)*

During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members, were named, but not proved, as being, or having been, members of the Communist Party. Thus, the record is clear that whatever doubtful nexus the frequently false Report of the Joint Legislative Fact-Finding Committee (Washington Un-American Activities Committee) may have provided between the faculty of the University of Washington and subversive activities, that nexus was eliminated by the independent investigations, conducted by the Board of Regents, which termi-

nated in probations or dismissals of six faculty members. It is extremely doubtful whether, on this record, the 31st session of the Washington legislature of 1949 could demonstrate and "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." However, as the District Court failed to note, the 1949 session of the legislature enacted no "anti-subversive" legislation.

It was not until 1951, and the thirty-second regular session of the Washington Legislature, that such legislation was enacted. When the 1951 Legislature convened, Governor Langlie reminded it of the disclosures of the Washington Committee on Un-American Activities. In his message he made references to the Committee's Report, but he made no references to the University of Washington. He advised that "in light of the grave emergency which we now face, additional action must be taken immediately . . ." (Message of Arthur B. Langlie, Governor of Washington, to the Thirty-Second Legislature, January 10, 1951.) The 1951 legislative session enacted the comprehensive Washington Subversive Activities Act.

But, it was in 1955, six years after the Committee Report, that the 34th Washington Legislature, without holding any hearings, enacted the 1955 oath requirement challenged in this case. Thus, by no stretch of the imagination, can the needed nexus between the 1955 Act and "subversive activities" at the University of Washington be satisfied by the investigations of the Washington Committee on Un-American Activities during 1948, reporting in 1949.

We submit that the District Court not only failed to follow the mandate of this Court and thereby committed error when it made the wrong substantive decision on the nexus question, but also that it committed error in not examining the past history; that its decision on the nexus point assumed the existence of facts not found in this record and that its decision on this point ignored facts found in this record. In short, the District Court decided the nexus question presented by this case, without confronting, or exploring, the issues involved in it, although they had been fully briefed and argued.

There Is No Showing of an Interest of the State Which Is Overriding and Compelling

Even if there were no problems of nexus presented by this case, a constitutional problem would remain. Where state statutes seriously infringe upon freedom of expression, as in this case, then that infringement can be justified, if at all, only when the state clearly shows a substantial interest which must be overriding and compelling. If such interest is insubstantial, or non-existent, or not compelling, then, it clearly cannot outweigh or prevail against the protection afforded by the First and Fourteenth Amendments. *American Communications Association v. Douds*, 339 U.S. 382; *Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539.

In this case, the 1931 oath statute is designed to promote undivided allegiance to government, and it requires that every university faculty member exhibit such fidelity "by precept and example." The 1955 oath statute likewise seeks to promote loyalty and was characterized as a

"loyalty oath" statute by the District Court. The objective of both oaths is to encourage loyalty to state and national institutions, and to provide an incentive for the defense of our country. In short, it is the purpose of the oaths to protect the state against "subversive" infiltration:

> "A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching." *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 482.

But, the state here seeks to achieve its purpose by requiring professors to achieve a certain attitude and a certain prescribed state of mind. The oaths operate to discourage or suppress the utterance of certain prohibited doctrines and certain associations, not because the doctrines are dangerous, but because they have been outlawed by the Washington Legislature. Thus, this case raises a constitutional issue expressly left unresolved by this court in *American Communications v. Douds*, 339 U.S. 382 at 396, where this Court said:

> "Government's interest here is not in presenting the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced . . . . Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

It is too clear for argument that the two Washington statutes are not designed simply to identify persons, but rather, they have been designed to outlaw certain doc-

trines and to rid state employment of those, otherwise fully qualified, people who refuse to execute the oaths. The statutes in question here do not allow, for example, a state employee the opportunity to say that he is "a subversive person," and thereby be identified. They require that, if anyone is to qualify for state employment, only one answer can be given: that he is not a "subversive person," or a member of a "subversive organization," and, in the case of a professor, that he will promote "undivided allegiance to government" by "precept" and "example." Thus, only members of this statutorily defined class are eligible to serve as professors at the University of Washington. Everyone else is automatically excluded from any possibility of state employment, an exclusion based on criteria, constitutionally forbidden to the state, of belief, speech and association.

Thus framed, the constitutional issue narrows itself to whether the State of Washington can properly prohibit, as a condition of continued employment, freedom of speech, expression and association of professors, and other employees, at the University of Washington in the interest of the state in promoting what the legislature believes to be right thinking and correct attitudes on the part of its state employees, including professors. It should be clear that at least this much is necessarily involved in this case. If a state actually has this power, it becomes a monitor of thought, as it determines for its employees what is and what is not right thinking, and, in this case, the State Legislature becomes the monitor of thought and right thinking for every faculty member

at a great educational institution, the University of Washington.

When it balanced the interests in this case—the interests that a professor has in academic freedom and freedom of speech, association and expression against the interests that the state has in protecting itself from its employees uttering the prohibited doctrines and engaging in the prohibited associations—the District Court ignored the balancing done by this Court in its most relevant case. *Sweezy v. New Hampshire*, 354 U.S. 234, presented this Court with statutes of New Hampshire worded identically with those defining the 1955 oath in question here; and pitting (1) the interests of a guest faculty member of the University of New Hampshire in academic freedom versus (2) the interests of a state in protecting itself from subversion. The plurality opinion of four justices, not followed by the District Court, declared:

> "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." Id. at 251.

The concurring opinion of two justices—also not followed by the District Court—held:

> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority . . . To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy as protected by the Fourteenth Amendment, and the right of the State to self-protection." Id. at 266-267.

Thus, the joint decision of six justices in *Sweezy* bal-

anced the interests presented in this case in favor of a professor's constitutional rights to intellectual academic freedom. Although counsel urged this view, the District Court refused to follow the *Sweezy* case.

The lower court also refused to follow this Court's pronouncement in *Barenblatt v. U.S.*, 360 U.S. 109 at 112, that academic freedom is an area of special concern:

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

We submit the District Court committed error when, without any facts in record in this case to demonstrate the state's need to infringe upon liberty at the University of Washington, it held that the interests of the State of Washington in self-preservation justified imposing these thought- and action-conforming oaths upon appellant-professors, and other employees. Clearly, truth rings loudly in the words of J. B. Bury, particularly when his words are applied to the professorial appellants in this case:

> "A long time was needed to arrive at the conclusion that the coercion of opinion is a mistake, and only part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men." (J. B. Bury, A History of Freedom of Thought (1913).

But it is essential to recognize—as the District Court did not—the full extent of recent infringements upon constitutional liberty and their implications for academic and political freedom at universities in the United States today.

D. Recent Abridgments of Academic Freedom

It appears that pressures on our schools and upon our universities and colleges to become vehicles of orthodoxy have been increasing (See, e.g., 1962 enactments of Fla. Stat. §230.23, and LSA-R.S. §§2851, 2852) producing a spate of new attacks on professors and academic freedom. (See, e.g., The Lines of Attack on Academic Freedom, Part III, in MacIver, Academic Freedom In Our Time, 123-205 (1955); ACLU, Greater Philadelphia Branch, Academic Freedom: Some Recent Philadelphia Episodes (1954), and note, 42 Am. Ass'n U. Prof. Bull. 75 (1956)).

From 1945 to 1950, the American Association of University Professors had before it for consideration some 227 cases which involved academic freedom, not counting the many "situations" which are not classified as cases. Report of Committee T, 37 Am. Ass'n of Univ. Prof. Bull. 79 (1951). Later, during the decade of the fifties, legislative investigating committees heavily taxed academic freedom. Nineteen cases have been reported, and they usually involved a faculty member who refused to answer a question, thereby stimulating an institution to undertake actions that ultimately led to dismissal. (See the chart of these cases which appears at page 16 of the Brief of the Amicus Curiae (AAUP) in *Barenblatt v. U. S.*, 360 U.S. 109 (1959)). In some of the above cases, the faculty members as well as the university administration were at fault; nevertheless, this fact does not decrease the impact of the investigations and dismissals on the "spirit of freedom" so essential for fruitful academic labor.

In addition, there were fourteen dismissals from New York City Municipal Colleges (See, 42 Am. Ass'n Univ. Prof. Bull. 71 (1956)) under a state statute which this Court later found to be unconstitutional. *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551. Furthermore, R. E. Combs, counsel to the California Senate Committee on Un-American Activities, has testified that a number of college and university presidents in California have arranged for a "clearance" from the state committee of all new faculty appointees, and, privately, to receive "derogatory information" regarding their present staffs. Hearings, Subversive Influence in the Educational Process, 83 Cong., 1st Sess. pp. 605-622 (1953). Finally, it has been estimated that approximately 500 teachers (school and university) have been dismissed between 1948 and 1958, mostly for refusals to answer questions or to execute loyalty oaths as conditions of employment. See Appendix A in Brown, Loyalty and Security: Employment Tests in the United States, 498 (1958).

One point is entirely clear: fruitful intellectual labor requires, as its necessary condition, that all faculty members be possessed of a "sense of freedom." "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234 at 250. But, in the years which have followed World War II, when intellectual liberty has been so much under attack, one study finds that faculty members are no longer strongly possessed of a "sense of freedom." Lazarsfeld and Thielens, The

Academic Mind (1958). This study showed that: (a) 46% of all the teachers who were studied felt "apprehensive" about their freedom to teach and speak freely (pp. 84-85) but, a significantly higher percentage, 54%, of those teachers who were studied but without tenure felt "apprehensive" about their freedom (p. 240); (b) this "apprehension" put a "noticeable damper on the activities and opinions" of these teachers (p. 192); (c) some professors toned down their writings and did not express their full convictions and thought in their writings and avoided assigning "controversial" reference works for discussion (p. 197); (d) some teachers avoided controversial subjects in the classroom (p. 197); and (e) some teachers found that their relationships with their students were substantially impaired (p. 204 ff).

The heavy hand of attack on academic freedom has not been foreign to the University of Washington. Although some of the following facts have been discussed under the question of nexus, they bear repetition in this section on academic freedom. In 1947, the legislature of the State of Washington created a committee to investigate "un-American activities" in the state. That committee functioned for two years, holding two public hearings, and made its report to the legislature in 1949, two years before the enactment of the Washington Subversive Act of 1951, and six years before the 1955 amendment to that Act, the constitutionality of which is challenged in this case. The second public hearing was held on the University of Washington campus starting on July 19, 1948. During the hearings, the Washington Legislative Committee

investigated at least forty faculty members, including Professor Melvin Rader, appellant here. The committee unanimously, but absolutely falsely, reported to the legislature that Professor Rader did not tell the truth when he testified before the committee and falsely reported that he had been closely associated with twelve organizations officially cited as communist fronts and subversive (P-T.O. 117). A book reporting the activity of this committee, including its hearing on the University of Washington campus, has been published: Countryman, Un-American Activities in the State of Washington, 72-332 (1951).

As a result of the committee hearings, charges were filed, before the tenure committee of the University of Washington, against six members of the University of Washington faculty, charging, in effect, that certain faculty members, at that time (1949), either were, or had been, members of the Communist Party, and that they refused to admit it. In an open letter published in early October, 1949, University President Raymond B. Allen said that:

> ". . . the real question before the University of Washington is whether members of the Communist Party are qualified to serve on this University faculty, and, more specifically, whether they should be disqualified on the grounds stipulated in the Code." (Quoted from Countryman, Un-American Activities in Washington, 190-191 (1951).)

The net result of the tenure hearings was that three members of the faculty were discharged by the Board of Regents, and certain other members of the faculty, who

had been so charged, were required, as a condition of continued employment, to sign affidavits that they were not then members of the communist party and, in addition, they were put on probation for two years. The tenure committee hearings, the actions by the Board of Regents, and other university investigations of the faculty were concluded in 1949, two years before the enactment of the Washington Subversive Activities Act and six years before the 1955 amendment to that Act which is challenged in this case. See, Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington (1949). There can be no doubt that there were significant and substantial invasions of rights to academic freedom at the University of Washington.

> "These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250.)

> "When weighed against the great harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy v. New Hampshire*, 354 U.S. 234 at 261.) (Concurring opinion.)

E. The District Court Upheld Indiscriminate Infringements Upon Free Expression and Conscience When the Legitimate State Interest Can Be More Narrowly Achieved By Less Drastic Means; Thus, the Lower Court Upheld an Unconstitutional Previous Restraint.

In a recent case, *Shelton v. Tucker*, 364 U.S. 479 (1960),

this Court had occasion to apply the doctrine of prior restraint, holding unconstitutional an Arkansas statute which invaded academic freedom and freedom of assembly and association. An Arkansas statute sought its justification, in the "right of a state to investigate the competence and fitness of those whom it hires to teach in its schools . . ." *id.* at 485. This interest was held too insubstantial to justify the broad invasion of First Amendment rights.

That case, like the one at bar, was tried before a three-judge federal court wherein plaintiffs in *Shelton v. Tucker*, as did appellants here, asked that the District Court declare their rights under the Declaratory Judgments Act and that the District Court issue a permanent injunction perpetually enjoining the Arkansas statute. This Court granted this relief, holding that the Arkansas statute was a prior restraint on the freedom of intellectual liberty, speech and association. The Arkansas statute cast its net too broadly and indiscriminately:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, at 488.

In *Speiser v. Randall*, 357 U.S. 513, this Court, citing cases in which the doctrine of prior restraint had been applied (*id.* at 520 and 521), held unconstitutional a California statute which allowed a *privilege* of an additional property-tax exemption to World War II veterans, on the condition that they would take this oath:

"I do not advocate the overthrow of the Govern-

> ment of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *id.* at 515.

This oath in no way makes such sweeping infringements on freedom of expression as do the two Washington oaths at bar; they catch up an assistant to an assistant, or prescribe undivided allegiance.

In *Speiser*, the state offered the privilege of an additional tax exemption on the condition that the applicant execute the oath; whereas, in the case at bar, the State of Washington offers state employment, on the condition that the applicant execute oath forms A or B. It cannot be gainsaid that, in both cases, and in *Shelton v. Tucker*, *supra*, the oaths in question deal with intricate and complex webbing of the freedoms which make up the First Amendment: free speech, assembly and association. In such instances, then, the constitution requires that "the *operation* and *effect* of the *method* by which speech is sought to be *restrained* must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *id.* at 520, citing prior restraint cases. The question is whether a fair method had been established. When deciding this issue

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488.

As demonstrated by the record in this case, there are at least two alternative, and individually selective, procedures for identifying "subversives" and eliminating them

from state employment at the University of Washington. These procedures are less drastic than the oaths. These two procedures are currently in force and have the same purpose as do the oath requirements, questioned in this case.

The first technique has been set forth by the Washington legislature when it enacted Washington's Subversive Activities Act, Section 12, Chapter 254, Laws of Washington, 1951, providing:

> "Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

This statutory provision, in force today, allows the University of Washington to use a selective approach to the problem of "subversive employees" and does not have within it the vice of a wholesale infringement on First Amendment rights implicit in the use of the two oaths. This section, considered alone, functions as a means of identification and not as a necessary technique of exclusion, and, in this way, too, it is less drastic.

The second more selective and, hence, less drastic, alternative to the problem of subversives is found in the Ad-

ministrative Code of the University of Washington. It dates prior to the 1951 legislative enactment cited above. The Faculty Appointment Policy clearly establishes the fact that "subversive" persons are ineligible for appointments. Volume II of the Faculty Handbook, Chapter I, pages 19 and 20, set forth the Basic Considerations Involved in Appointments of Faculty at the University of Washington (Ex. 4):

> "The University should avoid harboring within its faculty any who are dedicated to the destruction of our liberties and our free institutions, upon which universities depend for their effective functioning. (*id.* at 19.)
>
> "The Subversive Activities Act of 1951 . . . imposes a restriction upon the power of the regents to appoint or retain as a member of the university staff any 'subversive person' . . . But, even prior to the legislative enactment of 1951, the regents, exercising the discretion vested in them by statute, had taken the position that active members of the communist party are disqualified to serve upon the University Faculty. This policy in effect anticipated the requirements of the state Subversive Activities Act." (*id.* at 20).

University President Charles E. Odegaard has stated that the existing recruitment procedures are adequate to protect the public interest (P-T.O. 93). They have been improved from time to time and, during the time these oaths were not administered, because of the injunction in the prior litigation, lasting from 1955 to 1962, no "subversives" have become state employees at the University of Washington (P-T.O. 98-99). In addition, many appellants, and others similarly situated, have security clearances for top level governmental research (P-T.O. 99).

Thus, it is clear that the record in this case presents two less drastic alternatives involving more selective procedures than do the oaths. Neither alternative makes the same broadside attack on First Amendment liberties. Each has provided for security measures in a fashion such that a good faith exercise of conscience or other First Amendment rights affords a hearing which may except an individual from their application, this issue would be determined by state agencies in the same manner as other factual issues. But, the 1931 and 1955 statutes fail to make specific provision for the exceptional, the explainable, or for the man of principle.

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures is not a hardened communist, but a loyal citizen with conscientious scruples. The 1931 and 1955 statutes assure this result. This problem is easily rectified if the legislature were required to dispense with the shorthand of a summary oath form, and provide more extensive and fair screening procedures (which in fact already exist and are used at the University of Washington).

This Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights. The Washington statutes questioned in this case do not meet this constitutional test. Consequently, they are unconstitutional previous restraints on freedom of expression.

This conclusion is patently clear, and it was urged to the District Court. Although plaintiff-appellants' trial brief

contained some 22 pages devoted to a discussion of the prior restraint point, and although the point was orally argued, the District Court dismissed this argument with the following inadequate paragraph:

> "As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point."

We submit that the District Court not only committed error on this point in that it reached the wrong substantive decision on the prior restraint question, but also, that it committed further error when it ignored the facts found in the record and decided this question without confronting, or exploring, the issues involved in the question, although they had been fully briefed and argued.

II.

The District Court Upheld the 1931 and 1955 Enactments Although Said Enactments Infringe Upon Freedom of Expression Without Affording a Hearing, and Although They Shift the Burden of Proof; Each of Which Is In Violation of Due Process of Law.

A. The Lack of a Hearing

The District Court's opinion clearly indicated that this question is substantial: "As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process."

But, instead of deciding this question, the lower court assumed it away by assuming the existence of facts not found in the record and without exploring the issues this question presented, and without considering, indeed ignoring, the expressly stated policy of the Washington legislature, the Board of Regents and the Washington State Supreme Court on this point. The District Court held: "The fact that refusal on any ground is declared to be 'cause' for immediate termination of employment does not close the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a willful refusal to make disclosure as to whether or not the employee is a member of a subversive organization. . . . As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or

under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner."[49]

We submit that state policy on this point is not a matter for speculation.

It has been established in the above discussion of question one that the oaths in this case severely infringe upon freedom of conscience, religion and expression. Facts occurring subsequent to the date this Court declined jurisdiction in *Nostrand v. Little*, 368 U.S. 436, close the door to effective hearing and inquiry. They show that the infringement upon freedom of expression is without a meaningful hearing afforded to any employee at which he could explain or defend his refusal to execute the oaths. This is the state policy declared by the Washington legislature, and followed by the Board of Regents and the Washington Supreme Court, and which was ignored by the lower court. It will be demonstrated as follows:

On or about May 25, 1963, as shown by a memorandum from President Odegaard (P-T.O. 87), which, in part, demanded that appellants execute the oaths in question in this case, and which they have refused to sign, the Board of Regents of the University of Washington adopted the following statement relative to those faculty members having tenure who should not sign the proffered oath:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice

of termination of employment, and appeal to the tenure committee, it *should be indicated that the grounds for termination are failure to comply with a provision of Washington State law which is binding upon the Board of Regents.*

"Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

" 'The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.

" 'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents, as defined in the laws of the State of Washington.'

"In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow customs on tenure described in Chapter 25 of the Faculty Code. The Board, *however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington, and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath.*" (Emphasis supplied.)

This statement by the Board of Regents means that it has adopted a new ground for dismissal of tenured faculty: failure to execute the oaths here in question. In meeting the responsibilities and obligations imposed upon the Board by the Laws of the State of Washington (including Chapter 103, Laws of Washington, 1931, and Chapter 377,

Laws of Washington, 1955), it cannot waive the requirements of the acts in regard to the execution of the oaths; and thus the customs affecting professors with tenure, as described in Chapter 25 of the Faculty Code, cannot and will not be followed. In short, any tenure hearing would be a sham because no explanation or justification for refusal to sign the oaths could be accepted. Yet, these very rules and regulations, before amendment by the Board of Regents, were relied upon by the Supreme Court of the State of Washington (and as set forth in the appendix to the decision of *Nostrand v. Little*, 58 Wn.(2d) 111 at 135-137) as affording a hearing to Professors Nostrand and Savelle, holders of tenure. At page 131 the Washington court held:

> "We are of the opinion that the provision in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract is deprived of the right to a hearing as provided in the rules and regulations of the University. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the University's rules and regulations, set forth in the appendix to this opinion."

The ruling by the Board of Regents accords fully with the intent of the Washington legislature as it is revealed by the structure of the oath statute itself. Section 1 of Chaper 377, Laws of the State of Washington, 1955 (RCW 9.81.070, the statute under scrutiny), provides that

refusal to execute the anti-subversive oath "*on any grounds* shall be cause for *immediate termination* of such employee's employment" (emphasis supplied). RCW 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections can have only one meaning—ignored by the District Court—that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith, or the purpose thereof, nor why he is unable or unwilling to execute the oath, nevertheless, he is subject to immediate and automatic discharge without any realistic opportunity to be heard or to explain his refusal to execute the oath. There are no exculpatory grounds.

If there were no possible explanation or defense for a refusal to execute the oath, or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concomitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause an employee at the University to refuse to sign this oath and which situations would in no way reflect on the employee's loyalty or fitness for the job. The employee might be associated with a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely

to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. (Cf. *Scales v. U.S.*, 367 U.S. 203; *Bridges v. Nixon*, 326 U.S. 135.)

In none of these situations should his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership, under the statutes at bar, would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 of the 1955 Act, or (2) would require a false statement under oath that he is not a member of the subversive organization which in turn would disqualify him for public employment pursuant to RCW 9.91.060, and qualify him as a target for a perjury action. There is no middle ground.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship grants under the National Defense Education Act of 1958 solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed by the Washington State Statute. (See, P-T.O. 96). Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Asso-

ciation of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal. (See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.) And, finally, Congress has repealed it. If the taking of an oath, such as the ones under scrutiny, is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens, such as appellants in this case, simply because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No meaningful opportunity is afforded a State employee, appellants here, to explain or defend his failure to execute the oath or his affiliation with a "subversive organization."

The Washington Supreme Court has expressly declared state policy which stimulated the ruling by the Board of Regents on May 25, 1962, discussed above. That court has determined that if a tenured professor should request a hearing and refuse to execute the oaths, then he should be dismissed solely for that reason. Thus, the hearing afforded tenured professors is a sham. The Washington Court, twice, has declared state policy on this point. In *Nostrand v. Little, supra,* at page 131 the Washington Court said: "If he does not wish to sign the oath, he may

seek private employment." This statement is simply an affirmation of the position of the Washington Court in its earlier case involving these statutes:

> "Respondents [Professors] are not compelled by section 12 [the section requiring the 1955 oath] to do anything. But if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, and *their refusal to do so renders them ineligible for further employment*" (emphasis supplied). *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.)

The Washington Supreme Court has indicated that non-tenured professors are not entitled to a hearing. It has been very careful to limit the areas in which hearings would be granted, limiting these areas to persons holding tenure or civil service rights. At page 123 in *Nostrand v. Little, supra*, it stated:

> "This court has very recently held in *Yantsin v. Aberdeen*, 54 Wn.(2d) 787, 345 P.(2d) 178 (1959), that, in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. . . . Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge."

There can be no question argued regarding the Civil Service Act. This act is RCW 41.06. That statute is clear in that the non-tenured appellants in this case are not entitled to a hearing under the State Civil Service Law. Non-tenured employees would include both non-tenured faculty and certain other employees of the University

having no teaching responsibilities. Section 7 of that Act clearly provides:

> "The provisions of this act do not apply to . . . (3) Academic personnel of the institutions of higher learning and other such positions as are exempted under section 5 of this act; . . ."

The other exemptions in Section 5 include students, part-time or other temporary employees, and "part-time professional consultants." Thus, clearly all non-tenured appellants in this action are not afforded a hearing by the Civil Service Act.

In addition, the Washington court also decided other questions relating to state law and which had been argued in *Nostrand v. Little, supra,* by the Attorney General to govern the professors' right to a hearing. This holding is extremely significant for the appellants in this case who are non-tenured and thus, receive no hearing under the tenure code. The Washington Supreme Court stated that the Administrative Procedures Act has no application to the University of Washington regarding the execution of the oaths in this case:

> "The regents have urged, in their reply brief, that the professors are entitled to a hearing under the model state administrative code (Laws of 1959, chapter 234, RCW 34.04.010 et seq.), citing *Wong Yang Sung v. McGrath,* 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445. However, we are of the opinion that this 1959 statute was not intended to supersede established procedure adopted by the regents pursuant to RCW 28.77.120 and 28.77.130. There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years."

This Court, in many circumstances, has had to look behind an administrative hearing or trial to see whether it has been a hearing in fact. If this Court finds that only a sham hearing took place, where a real hearing is required, then, it has struck down the results of the sham hearing as a violation of due process of law. See, *Moore v. Dempsey*, 261 U.S. 86, (mob-dominated trial); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, (no real trial of issues in a civil suit); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, (immigration hearing board failed to exercise its statutory discretion due to acts of Attorney General); *Tumey v. Ohio*, 273 U.S. 510, (Pecuniary interest of Judge in result of trial); *Powell v. Alabama*, 287 U.S. 45, (court-appointed counsel found not to have been adequately representing defendant); *Thompson v. Louisville*, 362 U.S. 199, (lack of evidence made conviction a denial of due process).

In this case, the alleged hearing, based solely on the issue of whether or not the professors have signed the oath, has a predestined outcome since their failure to sign the oath will itself be the occasion for its being, and the irrebuttable evidence sufficient for dismissal. The "hearing" is consequently a meaningless act and will not serve to protect the tenured professors' rights. This sham hearing in the case of tenured professors, and the even more summary dismissal of the non-tenured professors, constitutes arbitrary action of the state under the doctrine of *Slochower*.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, this Court pointed out that, even though "a per-

son does not have a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms". (p. 555). In the majority opinion in that case, Mr. Justice Clark stated:

> ". . . *Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517, 72 S. Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S. Ct. 909, upheld the right of the City to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association . . ." (Emphasis supplied.)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, in the *Slochower* case, this Court held:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dismissal of appellant violates due process of law.*" (Emphasis supplied.)

The statutes requiring the "1931 oath" and those requiring the "1955 oath," in the case at bar, are as summary and therefore as unconstitutional as was the charter provision struck down in *Slochower*.

Both the Washington State Supreme Court earlier, and, in the case at bar, the District Court, tried to uphold the 1955 statutory requirement on the ground that it constituted an investigation of the qualifications (including loyalty) of state employees. However, the procedures involved in this case are very definitely not investigative, but constitute an arbitrary prerequisite for obtaining or continuing to hold state employment. No employee is allowed to give information; instead, he must give the right answer. The automatic and summary manner of dismissal for failure to give the right answer points up the conclusion that this requirement is not an inquiry into the fitness of the employee, or into his loyalty, or a search for information, but is purely a punitive step designed to penalize those who will not or cannot take the oaths.

Perhaps this requirement might exclude some disloyal or otherwise unfit employees, but at the same time it also excludes loyal and fit employees without recourse and/or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, a meaningful opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is not only lacking in this case but is expressly prohibited by the use of the words "on any

grounds" in the statute. This violates the fundamentals of due process of law, and error was committed by the District Court in not so holding.

The 1931 statute operates even more summarily:

> "Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void."

The District Court fully agreed that the statute is clear and agreed that the operation of the 1931 statute is summary:

> "In view of the mandatory language of the statute there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit that the District Court committed further error, and abuse of discretion, when it declared that the 1931 statute is clear and that it operates automatically, but failed to declare it arbitrary, and hence, unconstitutional as a deprivation of a due process of law.

B. Shifting the Burden of Proof.

Speiser v. Randall, 357 U.S. 513, was a case in which this Court struck down a California oath, less drastic in breadth than the ones questioned in this case, and which was required before property owners could qualify for a tax exemption. This Court held that since the oath in-

fringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer" (*id.* at 529), then, it constituted a violation of due process of law. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," namely, execute the oath as a condition of obtaining a tax exemption. The procedure was invalid, placing an unconstitutional burden on free speech, and because of this, appellant could not be denied a tax exemption for failure to execute the oath—for refusing to take the first step in an invalid series.

We submit that *Speiser v. Randall* applies to this case in at least two ways. On the one hand, appellants here have been demanded, as they were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive appellants of due process because neither the 1931 nor 1955 statutes offer a hearing as pointed out above. There can be no doubt of the burden on free expression in this case.

On the other hand, we submit that in the case at bar, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss of employment, etc., achieving the same practical, but constitutionally forbidden, result: The deterrence of free expression which was disallowed in *Speiser*. In that case this Court, at page 526, stated:

"The vice of the present procedure is that, when

> particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, Cf., *Dennis v. U.S.* . . . . provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free."

The 1955 oath clearly places the burden of persuasion and proof onto appellants, necessarily resulting in a deterrence of speech which the Constitution makes free. It presumes the guilt, and non-employability of all state employees, appellants here, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if an appellant comes forth and executes the expurgatory oath will he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and the disloyal. In other words, the oath presumes non-employability and then shifts onto appellants the task of understanding the complex statutory definitions of subversion and then requires appellants to make their declarations, only one answer of at least three possible ones being acceptable.

Nor is this the end of the matter. If appellants execute the 1955 oath, there remains under Washington statutes the possibility of further interrogations, conducted pursuant to the 1951 Washington Subversive Activities Act, and in which appellants are under statutory requirement, on pain of loss of employment, to come forth, under oath, and further to prove the negative of these complex statutory definitions, and otherwise satisfy their inquisitor. Thus, in this case, as in *Speiser*, the burdens of proof and persuasion are placed on appellants throughout the procedure.

But, even so, there is yet another hurdle for the professorial appellants here. They must execute, annually, still another oath, the 1931 oath of undivided allegiance, in order to qualify for their professorial jobs. If they execute the 1955 oath but refuse to execute the 1931 oath, then, the 1931 statute operates summarily, making their teaching contracts "null and void." This total procedure clearly constitutes an unconstitutional burden on free expression and is unconstitutional under *Speiser v. Randall*.

It is no answer to argue—as the District Court did—that *Speiser* does not apply because the oath statutes, as applied in this case, serve to protect the State from an evil sufficiently grave to justify the infringements upon free expression. The lower court's position is defective because the record in this case fails to reveal, as pointed out above, any nexus between appellants and any evil; and further, it is barren of any showing of a subordinating state interest which is compelling. These are the burdens for the State, appellees here, to show. In addition to this error, the

District Court committed another: it failed to follow this Court's analysis in *Speiser*. In *Speiser* this Court held inapplicable the principles of *Garner v. Board of Public Works*, 341 U.S. 716; *Gerende v. Board of Supervisors*. 341 U.S. 56, and *American Comr . Association v. Douds*, 339 U.S. 382, for the reason that in those cases "the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath, he retained his position." It is clear, as shown above, that even though appellants were to execute the oaths here, that act alone would not be conclusive evidence: further loyalty proceedings are expressly authorized under the 1951 Act which has been incorporated into the administrative code of the University. Nevertheless, the District Court cited the cases above, distinguished by this Court in *Speiser*, and then held that, because of the applicability of those cases, "*Speiser* is therefore not controlling."

We submit the lower court committed error and abused its discretion when it dismissed appellants' complaint with prejudice in full recognition of the facts that the statutes here in question shift the burdens of persuasion and proof, without a hearing, and therefore, in violation of due process of law. We submit this erroneous ruling, and its underlying issues, present a substantial federal question.

III.

The District Court Upheld the 1955 Statute in Question Here Even Though It Infringes Upon Freedom of Expression in That It Uses Terms Which Are Vague, Fluid and Indefinite, in Violation of Due Process of Law.

In a series of cases, this Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or to command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at their meaning and to differ as to their applications. *Winters v. New York*, 333 U.S. 507, and *Lanzetta v. New Jersey*, 306 U.S. 451, and cases cited therein. Moreover, the doctrine prohibiting unconstitutional vagueness gives additional protection to the several freedoms established by the First Amendment. *Winters v. New York, supra*, and see Note, The Void For Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960). Thus, this Court, in *Smith v. California*, 361 U.S. 147 at 150-151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

This Court has indicated that an oath, less sweeping in its infringement upon free expression than the one required by the 1955 statute, had a potentially inhibiting effect on speech. *Speiser v. Randall*, 357 U.S. 513. Furthermore, this Court has held that the doctrine announced in

Smith v. California, supra, is fully applicable to oaths which a state may require as a condition of employment. *Cramp v. Florida,* 368 U.S. 278 at 284.

In striking down the vague statute presented by *Winters v. New York,* 333 U.S. 507 at 518, this Court appears to have forecast the advent of this case when it said:

> "The next [case] may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

Thus, it is clear that strict standards against vagueness should be applied in this case involving as it does the penal definitions of "subversive persons" and "subversive organizations," and the threat of a perjury prosecution of professors at a great American University devoted to academic freedom and political expression. Cf. *Sweezy v. New Hampshire,* 354 U.S. 234.

Nevertheless, the District Court, invoking the canon of "reasonable construction"—something it inconsistently refused to do with the vague portions of the 1931 oath—upheld the 1955 oath:

> "It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used are to be understood in accordance with the ordinary meaning of the words in current usage."

To determine the ordinary meaning of the Washington Statute, the District Court reproduced portions of Webster's New International Dictionary (2nd ed.). As was done in *Lanzetta v. New Jersey,* 306 U.S. 451 at 456, we

set forth the oath required by the 1955 statute. The words in brackets are the words which the District Court held to supply meaning to the word immediately preceding the bracket, and, in the view of the District Court, thereby render that word, and the complete oath, clear and not a subject for speculation, or unconstitutional vagueness.

On the pain of loss of employment, or subsequent perjury prosecution, a professor must now swear that he *understands* the following:

> "Subversive person means any person who . . . advocates, abets [incites, encourages, instigates or countenances; in a disparaging sense] advises or teaches by any means [in any way; possibly, or at all] any person . . . to aid in the commission of any act intended . . . to assist [to lend aid; to help] . . . in the alteration of the constitutional form of government . . . by revolution, force or violence . . ."

We submit that the opinion of the District Court in no way clarifies or makes certain the oath, but rather, its opinion makes the oath broader and the meaning of the oath more fluid and obscure than previously, and that the lower court committed error when it upheld the existence of this vague and fluid oath, because in its entirety, as well as in its several words, it infringes upon freedom of expression in violation of the doctrine set forth in *Smith v. California, supra*, and, in light of the threat of perjury, the oath insures that the dissemination of ideas will be the loser. Thus, we submit that a substantial question of unconstitutional vagueness is presented by this case.

IV.

The Oaths Are Bills of Attainder in Violation of the Constitutional Prohibition Thereof.

The oaths in question in this case are test oaths, punishing appellants legislatively without any adjudicatory process. The 1955 oath is expurgatory, but both oaths function, in this case, to deprive otherwise fully qualified and competent employees of their employment, good consciences and professional integrity.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, at 320, this Court held that a statute depriving a person "of any rights, civil or political, previously enjoyed, may be punishment . . ." and constituted a bill of attainder. There can be no doubt that the statutes in this case infringe upon, and deprive appellants of "political" rights. In addition, tenure is a "right," and this Court has not considered state employment as a "privilege." Among the unconstitutional deprivations inflicted in *Cummings* were denials of the vote and the opportunity to hold office. In *United States v. Lovett*, 328 U.S. 303, denial of compensation for federal employment was held a sufficient deprivation to invalidate the statute as a Bill of Attainder.

The oaths in this case are not retrospective, but historically, Bills of Attainder need not be retrospective. As Mr. Justice Frankfurter pointed out in concurrence in *Lovett, supra*, at 323, "Frequently, a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or *ex post facto* Law shall be passed.'" This was the court's view

in *Cummings, supra, ex parte Garland,* 71 U.S. (4 Wall.) 333, and *Lovett, supra.*

Recently, the opinions of this Court have erroneously accepted the principle that in order to constitute a Bill of Attainder a statute must be *ex post facto* rather than having been designed to prevent future actions. See, *American Communications Association v. Douds,* 339 U.S. 382, and *Communist Party of the U. S. v. S. A. C. Board,* 367 U.S. 1 at pages 86-87. An excellent writing has fully demonstrated this Court's error:

> "It is, however, a principle belied by the history from which its proponents contend it was culled . . . some English bills of attainder were passed in order to prevent certain types of future conduct on the part of the person or group attainted . . . these historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted." (Comment, The Bounds of Legislative Specifications: A Suggested Approach to the Bills of Attainder Clause, 72 Yale Law J. 330 at 338-339 (1962.))

Thus, it is clear that the opinions of this Court on this subject employ conflicting rationale; some cases, after 1949, have taken a literal approach to the problem, and others have taken a functional approach.

We submit that (1) the writings contemporary with the adoption of the Constitution, and that (2) the pre-Constitutional bills of attainder show that a literal interpretation of this clause, including a requirement of *ex post facto* operation, is error. A broad functional purpose should dominate this Court's future judicial construction of this constitutional provision. We submit the opinions of

this Court make this question substantial and since test oaths historically have been notorious bills of attainder we submit that this case provides this Court an opportunity to clarify its conflicting rationale on the Bill of Attainder provision.

V.

The District Court Upheld State Statutes Which Are Void Because They Violate the Supremacy Clause of the Constitution and Interfere With Foreign Affairs and Attempt to Promote Loyalty to and to Regulate, Restrict and Proscribe Sedition Against the United States, a Field Entirely Within the Province of the Federal Government, and Which the Congress of the United States, by Legislative Enactments, Has Preempted and Wholly Occupied.

This Court has indicated that the Washington Legislature has no more constitutional discretion to command loyalty to the federal government as a condition of the employment of appellants, and others similarly situated, than it has discretion to command loyalty to the government of France. Such legislation infringes on the highest prerogative of the sovereignty of the federal government: the power to command the loyalty of its people. It alone may legislate on questions of *national* loyalty.

> ". . . The United States is not only a government, but it is a national government, *and the only government in this country that has the character of nationality.*" Mr. Justice Bradley concurring in *Knox v. Lee*, 12 Wall 457, at 555. (Emphasis supplied.)

As Chief Justice Marshall stated in the case of *The Exchange*, 7 Cranch 116 at 136:

"The jurisdiction of the nation within its own

territory is necessarily *exclusive and absolute.* It is susceptible of no limitation not imposed by itself. *Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.*

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." (Emphasis supplied.)

In *Pennsylvania v. Nelson*, 350 U.S. 497 at 509, this Court unequivocally held that the Pennsylvania decision on review was "unassailable" in its holding that: "Sedition against the United States is not a *local* offense. It is a crime against the *Nation (id.* at 505). Thus, "Congress having . . . treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem." *(ibid).*

This Court reaffirmed its position in *Uphaus v. Wyman*, 360 U.S. 72 at 76:

". . . In *Nelson* itself we said that the 'precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*'"

Thus, this Court, in *Uphaus*, has made it clear "that a State could proceed with prosecutions for sedition against the State itself" *(ibid)*, but that a state has no power to proscribe the same conduct against the United States, made criminal by the Smith Act.

It should be noted that the Washington Subversive Activities Act is broader than the Smith Act, and there are many sections of both oath statutes under attack here that refer specifically to the United States and cover the same area and proscribe the same conduct prohibited by the Smith Act. It is clear that the State of Washington has no power to command anti-sedition, or undivided allegiance oaths viz-a-viz the United States, and that these portions of the oaths, referring to the United States, have been pre-empted. The District Court's inadequate paragraph on this point is manifestly in error, indicating that it did not reach the real issues, although they had been briefed and argued, when it decided the question:

> "The pre-emption argument based on *Pennsylvania v. Nelson*,[34] need not detain us long, on these facts. The Court's opinion in *Uphaus v. Wyman*[35] indicates that Nelson did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area."

We submit this inadequate and erroneous ruling presents a substantial federal question.

VI.

The District Court Upheld the Washington Statutes Requiring Oath Forms A and B Which Are Void Under the Fourteenth Amendment's Due Process Clause, Protecting Appellants Against Compulsory Self-Incrimination.

A. Both the 1931 and 1955 Statutes Establish a Civil "Penalty" or "Forfeiture" Within the Scope of the Fifth Amendment Protection Against Self-Incrimination.

A cardinal tenet of the Anglo-American concept of

procedural due process is freedom from self-incrimination. *United States v. White*, 322 U.S. 694, at 698-699 (dictum), and *Quinn v. United States*, 349 U.S. 155, 161-162 (dictum). Mr. Justice Field, dissenting in *Brown v. Walker*, 161 U.S. 591, at 637, declared:

> "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration."

The state may not coerce the production of either testimony or effects from a party against whom—if produced—such evidence might lead to the imposition of a "forfeiture" or "penalty." *U. S. v. Collins*, 25 Fed. Cas. 545; *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476.

Failure of appellants to execute oath forms A or B will result in loss of their tenure rights, good reputations, credit standing, and even their chosen livelihood for which many have spent years in preparation. (Pre-trial order; Admitted Facts, para. 23 (p. 87), para. 30 (p. 89). This result constitutes a "forfeiture" or "penalty" within the protection of the rule against self-incrimination. *Cohen v. Hurley*, 366 U.S. 117 at 145-149 (dissenting opinion); 35 Tul. L. Rev. 400 at 428 (1961). It is not enough to say that these statutes are not retributive in purpose or are aimed at preserving the State of Washington. Their substance and effect are punitive, and their purported motivation of public protection lies at the core of every criminal law. 35 Tul. L. Rev. 400, 414 (1961). The oaths serve no purpose other than invading constitutionally protected freedoms.

B. The 1955 Statute Is Void as Requiring Plaintiffs, and Others Similarly Situated, to Incriminate Themselves with Respect to Their Own Disloyalty.

Even if the civil jeopardy in which plaintiffs are placed upon presentation to them of the oath forms does not invoke the privilege against self-incrimination, surely potential conviction by the state for a criminal felony does. *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, 341 U.S. 479. Yet, this eventuality is exactly what appellants, and others similarly situated, are subjected to by the 1951 statute, as amended, requiring that they execute the so-called "negative disclaimer." Chapter 377, Laws of Washington, 1955, amending Chapter 254, Laws of Washington, 1951 (RCW 9.81.070); the pertinent provision of which reads:

> ". . . Every such person, board, commission, council, department, court or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Since a "subversive person" or member of the communist party or other "subversive" organization is defined *within the same statute* as constituting a felony (RCW 9.81.020-030) and since the avowed function of the legislation—as construed in *Nostrand v. Balmer*, 53 Wn.(2d) 460—is the removal of such "subversives from the state payroll," appellants and others similarly situated, who refuse to sign the oath would necessarily be providing a

"link in the chain needed in a prosecution" under 9.81.020 of the Act, as well as under the Smith Act. *Blau v. United States*, 340 U.S. 159 at 161. Appellants are thus faced with a Hobson's choice. Either they must execute an oath which is vague in its scope (an act in itself offensive to them, causing them emotional anguish in that they must compromise their consciences) and thus face, either because of professional activities or intellectual belief, the genuine possibility of prosecution for perjury by a zealous state, or appellants may choose to refuse to execute the oath, thus facing immediate dismissal, the suspicion of their contemporaries, the taint of disloyalty, and—by their own act of refusal—the possibility of prosecution by a zealous state for the felony of being a "subversive person." There is no middle ground. There are no reservations. There is no opportunity given for explanation by either the statutes commanding the "1931 oath" or those commanding the "1955 oath."

That this probability is a realistic one is corroborated by this Court in *Cramp v. Florida*, 368 U.S. 278, at 286-287. This Court looked to peripheral activity such as that engaged in professionally by appellants:

> ". . . While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."

and in *Slochower v. Board of Education*, 350 U.S. 551 at 557-558:

> ". . . A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The deficiencies of the process are even more constitutionally repugnant as (a) there are other means available, and used, by the state for determining the qualifications of its employees at the University of Washington other than the ritual under consideration, and (b) as shown by appellants in their evidence, the signing or non-signing by them of the ritual has no rational bearing on their fitness to teach. The latter consideration distinguishes this case from the disbarment cases, and from the secondary school teacher cases.

The states do not have "free reign in the choice of means of forcing incriminatory testimony . . ." *Cohen v. Hurley*, 366 U.S. 117 at 129. The "1955 Oath," with the moral, professional and legal compunctions which it presents to the affiant, is certainly such a case where the legislature has strayed beyond its constitutional bounds.

We submit the time has come for this Court fully to incorporate the privilege against self-incrimination into the due process clause of the Fourteenth Amendment, and that this issue is substantial.

VII.

The District Court Improperly Refused to Declare Constitutional Rights of Appellants Regarding the 1931 Oath and Committed Error in Dismissing Appellants' Complaint With Prejudice.

A. The District Court Committed Error in Not Declaring Appellants' Constitutional Rights Regarding the 1931 Oath.

It is not clear whether the lower court invoked the abstention doctrine. It appears that the lower court believed it had absolute power to grant or deny declarative relief. In either event, this Court has made it absolutely clear that a United States District Court does not have untrammeled discretion to grant or deny declaratory relief, or automatically to invoke the doctrine of abstention, simply because the constitutionality of an unconstrued state statute, or an ambiguously worded state statute, is called into question. This much was implicit in *Harrison v. NAACP*, 360 U.S. 167, and this Court made the matter explicit in *NAACP v. Bennett*, 360 U.S. 471, and see, *Romero v. Weakely*, 226 F.(2d) 399 (C.A. 9th Cir. 1955). Nor has this court required that a complaint be dismissed when such questions arise. This has been clear since *Doud v. Hodge*, 350 U.S. 485 at 487:

> "... This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning of federal constitutionality of the statute."

Given the above holdings, and *County of Allegheny v.*

Frank Mashuda Co., 360 U.S. 185, it is obvious that a District Court cannot, without committing error and abusing its discretion, refuse declaratory relief and invoke the doctrine of abstention where the legislative language is clear or where only one reasonable interpretation of the words is possible. In these circumstances it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. This duty is the logical corollary of the holding in *Harrison v. NAACP*, 360 U.S. 167. Moreover, this is precisely what has been done in *Schempp v. School District of Abington*, 177 F. Supp. 398 (E. D. Pa. 1959), without adverse criticism from this Court, 364 U.S. 298.

Even moreso is it the duty of a District Court to decide the constitutional question presented to it when the District Court itself has concluded that the statutory language is clear, as the lower court did in this case with respect to the denial of a hearing and the summary operation of Section 4 of the 1931 oath statute. The lower court declared:

> "In view of the mandatory language there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit, therefore, that the District Court committed error and abused its discretion when it refused a declaration on the constitutionality of Section 4 of the 1931 oath enactment simply because Section 1 thereof contained in the court's view, some few words which possessed some degree of ambiguity which had not been resolved by the Washington courts.

Furthermore, we submit that the lower court viewed its power as extending so far as to deny its own jurisdiction, and further, to invoke abstention as untrammeled and without boundaries, including the power to defeat the very purpose of the Declaratory Judgment Act, the jurisdictional statutes: 28 USC 1331 and 1343 (3), and the civil rights statute 42 USC 1983 involved in this case. The lower court stated that the granting of declaratory relief was a matter of sound discretion committed to the District Courts, and:

> "Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the class of state employees here represented *has suffered actual injury by reason of the application* of the oath of allegiance statute . . . this court will decline to render a declaratory judgment . . ." (Emphasis supplied.).

Since a declaratory judgment action necessarily must be brought before "actual injury by reason of the application" of the oath to appellants, the District Court has set an impossible burden upon their shoulders. Appellants cannot show *actual injury* before the statute has been actually applied to them. Yet, appellants cannot obtain a declaration of rights, under this ruling, without subjecting their rights to actual injury. Thus, the position of the District Court completely defeats the purpose of Congress when it enacted the jurisdictional statutes, the civil rights statute, and the Declaratory Judgment Act.

> "One of the highest offices of declaratory procedure is to remove uncertainty and insecurity from legal relations, and thus clarify, quiet and stabilize them before irretrievable acts have been undertaken." (*De-*

laney v. Carter Oil Co., 174 F.(2d) 314 at 317 (C.A. Okl. 1949), cert. den. 338 U.S. 824.)

This is also the view of the Ninth Circuit:

> "The purpose of the Declaratory Judgment Act is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *(Shell Oil Co. v. Frusetta*, 290 F.(2d) 689 at 693 (C.A. 9th Cir. (1961)).

We submit that the lower court abused its discretion when it abandoned this view and that it committed error in refusing to rule on the constitutionality of the 1931 oath statute for the reason that appellants had not yet shown any actual injury.

In addition, we submit that the following words with respect to the 1931 oath are clear and can have only one reasonable interpretation, and that the lower court forthrightly should have ruled this oath unconstitutional as an infringement upon the First and Fourteenth Amendments, and the Supremacy clause:

> "I solemnly swear . . . that I will . . . by precept and example promote . . . undivided allegiance to the government of the United States."

Indeed, the District Court itself must have believed that these, and other, words of the 1931 oath were clear because at the beginning of its opinion on the 1931 oath, the court refers back to its discussion of the First Amendment with respect to the 1955 disclaimer oath. It stated that:

> "Insofar as the arguments heretofore considered

with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the lower court did not invoke abstention on these points and that it ruled erroneously on the substantive questions. However, if it be the view that the lower court did invoke abstention, then, we submit that it abused its discretion in so doing, as the above quoted paragraphs clearly demonstrate and that substantial questions are presented. *NAACP v. Bennett*, 360 U.S. 471; *Toomer v. Witsell*, 334 U.S. 385, and *Cf. Chicago v. A. T. & S. F. Ry.*, 357 U.S. 77.

B. The District Court Committed Error in Dismissing Appellants' Complaint Assuming, Arguendo, That Abstention Was Properly Invoked.

The doctrine of abstention does not raise a question of power, but rather, a question of judicial discretion. *Catoggio v. Grogan*, 149 F. Supp. 94 (D.C. New Jersey 1959). The doctrine is designed to serve the purposes of comity, allowing a state court to resolve questions of statutory construction, where state statutes are reasonably and fairly open to doubt. But, as this Court has declared:

> ". . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention, . . ." *(Harrison v. NAACP*, 360 U.S. 167 at 177).

Thus we submit that the District Court committed error when its final order certified that appellants' "complaint be and it hereby is dismissed with prejudice."

VIII.

It Is a Substantial Question Whether Washington's Legislature Has Power to Disqualify Every Citizen Absolutely From the Profession of Teaching, Public and Private, on the Sole Ground That He Has Refused to Execute the Oath of Undivided Allegiance.

It is beyond doubt that the profession of teaching is an old, honorable and lawful one, and that its calling is within the "liberty" protected from unwarranted deprivation by the Due Process clause of the Fourteenth Amendment:

> "Plaintiff in error taught this language [German] in school as part of his occupation. His right thus to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the (Fourteenth) Amendment." *(Meyer v. Nebraska*, 262 U.S. 390 at 400 and see, *Farrington v. Tokushige*, 273 U.S. 284, and *Pierce v. Society of Sisters*, 268 U.S. 510.)

Appellants admit, as indeed they must, that Washington may submit the profession of teaching to regulations, but those regulations must be reasonable and rationally connected with fitness for teaching. *Douglas v. Noble*, 261 U.S. 165; *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 at 239, footnote 5.

In this case, the oath requires that all teachers have closed minds on certain subjects, e.g. allegiance to government, regardless of their consciences or religion. We submit that such a requirement cannot constitute a rational relationship to fitness for the profession of teaching. This Court declared as much in *West. Va. v. Barnette*, 319 U.S. 624.

In the *Barnette* case, this Court disallowed States power to compel children to pledge allegiance to the flag of the United States. Making a sharp distinction between education and indoctrination, this Court defined the question there as follows:

> "... the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country .... Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arouse loyalties constitutionally may be a short-cut by substituting a compulsory salute and slogan. ..." (At p. 631)

If a state cannot require its school children compulsorily to perform this act of allegiance (albeit not "undivided"), we submit that it cannot be said that a broader and more severe oath, the 1931 oath, is a rational qualification for teachers. Even if the oath were rational for first grade teachers, which we do not admit, appellants are university professors whose function it is to inspire their students toward the discipline of an unfettered search for truth, no matter what conforming idolatry might be shattered in the process.

> "... But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Va. v. Barnette*, 319 U.S. 624 at 642.

To hold that the 1931 oath, however construed, is rationally related to the fitness of a university professor is to deny religious and academic freedom, and to make a mockery of our great universities. The irrelevance of this oath to fitness to teach at the university, indeed its hostility to true qualifications of fitness, is clearly revealed by the past practice of university administrators, in part, discussed below in question nine. We submit that this question is substantial and it is not foreclosed by such cases as *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82, or *In re Summers*, 325 U.S. 561, which relied upon *U.S. v. Schwimmer*, 279 U.S. 644, and *U.S. v. Macintosh*, 283 U.S. 605, and which were overruled in *Girouard v. U.S.*, 328 U.S. 61.

IX.

The District Court Committed Error in Denying Standing to the Alien Appellants to Challenge the 1931 Oath.

The lower court erroneously cited only one case: *Poe v. Ullman*, 367 U.S. 497, as justification for its holding that: "The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced." The cited case does not control because the facts are not present in the case at bar for *Poe v. Ullman* to be operative. There is absolutely nothing in the record to show that the 1931 oath "has never been enforced" as to aliens. To the contrary, the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors at the University of Washington. (P-T.O. 77). Thus, the

lower court's holding assumes a state of facts not found in the record, the possible existence of which is expressly contradicted by the record and *Poe v. Ullman* is not operative here. Sifice some version of the oaths consistently has been required of aliens, then it is clear that they have standing to challenge the oaths under the rule of *Cramp v. Florida*, 368 U.S. 278, and that the District Court committed error in denying alien appellants this right.

Furthermore, the holding of the District Court necessarily demands that it presently approve an invidiously discriminatory past practice of University officials, which, in operation, amounts to an unconstitutional denial of the equal protection of the laws, thereby abridging the Fourteenth Amendment. This Court has long held that, although a state statute may be fair on its face and impartial in its appearance, yet, if it is applied and administered with an unequal hand to persons in like circumstances, then, it is a denial of equal protection of the laws. The Fourteenth Amendment clearly requires equal operation of the laws upon all persons who are in like circumstances. *Yick Wo v. Hopkins*, 118 U.S. 356; *Soon Hing v. Crowley*, 113 U.S. 703; *Chy Lung v. Freeman*, 92 U.S. 275, and *Maxwell v. Bugbee*, 250 U.S. 525. The unconstitutional past practice of the University administration was that of administering the statutorily-worded 1931 oath unevenly to professors, invidiously discriminating between citizens and aliens (P-T.O. 77). This practice was relied upon by the District Court as supporting its holding that alien appellants have no standing.

In addition, the past practice discriminated within the alien class itself, in not requiring a uniform oath of all aliens. Thus, even under the strict test of *Goesaert v. Cleary*, 335 U.S. 464, the past practice is unconstitutional, not only because it discriminated between aliens and citizens seeking the same position, but because it discriminated among the class of aliens seeking the same position, there being no uniform oath applicable alike to all aliens. It works an "irrational discrimination between . . . groups of persons . . ." *Goesaert v. Cleary*, 335 U.S. 464 at 466. Yet, the District Court relied upon the validity of this unconstitutional past practice for support for its ruling. This is clear error, for the lower court's holding rests on an unconstitutional premise; and cannot be allowed to stand. *(Takahashi v. Fish and Game Commission*, 334 U.S. 410 at 420: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws.")

Whatever may have been the past practice at the University, it is clear that the present administration's policy —ignored by the lower court—no longer is that of following the unconstitutional past practice. For example, one alien appellant, in this case, was actually demanded to sign the 1931 oath, statutorily unmodified. (See Ex. 17); in addition, President Odegaard stated that, on May 28, 1962, he demanded of "all employees of the University of Washington that they execute either Oath Form A or B, whichever might be applicable to them" (P-T.O. 91),

and finally, there is the agreed fact—ignored by the District Court—that ". . . pursuant to statute, a demand was made by President Odegaard . . . that all members of the teaching staff, including aliens, execute the Oath Form A here in question." (P-T.O. 78). We submit that alien appellants do have standing to challenge the 1931 oath; that the present University administration's policy is to administer the 1931 statute with an even hand regarding both aliens and citizens, and that this substantial question was clearly misdecided by the lower court.

X.

The Interest of Student-Appellants in Academic Freedom Is Adequate to Afford Them Standing to Sue.

This Court has recognized that academic freedom is protected by the First and Fourteenth Amendments, and that a professor has standing to invoke those Amendments when his interest in academic freedom is unwarrantedly infringed upon by a state. *Sweezy v. New Hampshire*, 354 U.S. 234. Furthermore, this Court, rightly, has recognized that academic freedom has two sides and that it necessarily involves students as well as professors:

> ". . . When academic teaching-freedom *and its corollary learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . *into this constitutionally protected domain.*" *(Barenblatt v. U.S.*, 360 U.S. 109 at 112) (emphasis supplied)."

Despite the above, the District Court, in its Order on Motion to Dismiss, dismissed the student-appellants from

this action. Yet, this case directly affects the quality of learning-freedom afforded students at the University of Washington. However, the lower court held that the student-appellants had "no direct legal interest in the requirement imposed on the teaching personnel." In so doing it cited three cases, none of which was discussed, nor was its citation of any apposite.

The District Court did not discuss, distinguish, or determine why the following cases, supporting student standing and argued to it, were not applicable to this case: *Engel v. Vitale*, 370 U.S. 421 (parents allowed to assert the rights of their children to attack a prayer required in the schoolroom); *Adler v. Bd. of Ed.*, 342 U.S. 485 (the parental assertions of the rights of their children in academic freedom were put forth to contest the validity of New York's Feinberg Law which was upheld by this Court over a dissent by Mr. Justice Frankfurter wherein he would have denied review on the basis of their lacking an interest to afford standing): *Hamilton v. Bd. of Regents*, 293 U.S. 245 (students at a state university had standing to contest a mandatory ROTC program); *Pierce v. Society of Sisters*, 268 U.S. 510 (the society asserted the constitutional rights of students to be educated in a private sectarian school); *Waugh v. Bd. of Trustees*, 237 U.S. 589 (student who applied for admission had standing to challenge a university's ban on fraternal allegiance).

In *Shelton v. Tucker*, 364 U.S. 479 at 487, this Court declared that "the vigilant protection of constitutional freedoms is nowhere more vital than in the Community of

American schools." And in another significant case, this Court said:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (emphasis supplied). *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250).

We submit that the oaths in this case create "an atmosphere of suspicion and distrust," particularly when a student's testimony might be the subject of subpoena and afford a link in the evidence offered in a prosecution of his professor for falsely signing these oaths. Thus, there is an infringement upon both aspects of the constitutionally protected domain of academic freedom. Inevitably, these oaths, if applied, will shrink the domain of learning-freedom afforded students at the University of Washington. We submit that the student interest in academic freedom in this case presents a substantial question of their standing to sue.

CONCLUSION

The issues presented in this case go to the heart of democratic processes in America. Today, when man has so much to learn about himself and his neighbors, it is vitally important to keep open the channels of academic and public discussion concerning the vital and troublesome questions which face the people of our nation in these difficult times. If upheld, the exercise of power by Washington's legislature in demanding the oaths in question here will block discussion of vital issues in the academic community where novel ideas and bold plans must be generated and evaluated. No legitimate interest of the state justifies the breadth of suppression of free expression, and the curtailment of the search for truth, which will occur if these oaths are applied to the University of Washington.

Universities and colleges do not possess or teach the whole truth. They are engaged in the quest for truth. For that reason their scholars must be left free to examine all facts and ideas, the unpleasant, the distasteful, and the dangerous ones, and even those regarded as erroneous by a majority of the Washington legislature. If a professor's theories fail to encompass the whole truth and do not conquer in detail every nuance of his subject, they may, nevertheless, profoundly broaden and alter the picture given by the last scholar in the field.

To a scholar, unchallengeable dogma and hypothesis are fundamentally incompatible with the very life spirit of a university. "The concern of its true scholar is not merely to add and revise facts in relation to an accepted

framework, but to be ever examining and modifying the framework itself." *Sweezy v. New Hampshire*, 354 U.S. 234 at 263 (concurring opinion). Some people believe that communists have become prisoners of dogma and no longer are intellectually free. Hence, these people argue that communists are unfit to teach at a university and can be excluded from the company of true scholars. This test may have some validity. But, if it does, by that same token, every professor who subscribes by oath or affirmation to the body of beliefs and dogmas officially, but unconstitutionally, set forth by the Washington legislature in the two enactments in issue in this case is likewise a prisoner of dogma. He is not intellectually free, and should be disqualified from teaching at a university for the same reason that a communist is disqualified.

In this case, the State of Washington demands that its otherwise fully qualified professors take thought-conforming and action-conforming oaths as a condition of their continued employment. Professors, under these oaths, are forbidden to discuss or to teach certain doctrines. The University of Washington is forbidden to employ believers in certain political or economic creeds. Thus, these enactments present great dilemmas to the academic community, for, in fact, they prevent that community from following the free ways which are at the very core of its being. If a professor abides by these enactments, then, by as much as he observes the law, he ceases being involved in a truly intellectual endeavor. If the professor disobeys these enactments and carries out his professorial calling, then, he is a lawbreaker.

Immersed in these disturbing perplexities, we submit that this case presents substantial federal questions which are important and that they merit the fullest consideration by this Court.

Respectfully submitted,

ARVAL A. MORRIS
School of Law
University of Washington
Seattle 5, Washington

KENNETH A. MACDONALD
1410 Hoge Building
Seattle 4, Washington
Attorneys for Appellants

Of Counsel:
BYRON D. CONEY
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